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In The

Supreme Court of the United States

October Term, 1994

BEVERLY JOAN CARLISLE, as Next Friend of ANGELA CARLISLE,

Petitioner,

v.

DR. JOHN MUNNA,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether O.C.G.A. § 19-11-14, as interpreted by the Court of Appeals of Georgia in *Weaver v. Chester*, 195 Ga. App. 471, 393 S.E.2d 715 (1990) to allow recovery of retroactive child support for a child born out of wedlock only for such sums actually expended by the mother on behalf of the child, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, where children born in wedlock are entitled under Georgia law to receive retroactive child support based upon their needs and the fathers' ability to pay.

PARTIES

Petitioner-Plaintiff is the mother who brings this action as next friend of Angela Carlisle, the daughter of Petitioner and Respondent. Respondent is Angela Carlisle's father.

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No. _____

In The

Supreme Court of the United States

October Term, 1994

BEVERLY JOAN CARLISLE, as Next Friend of ANGELA CARLISLE,

Petitioner,

v.

DR. JOHN MUNNA,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

There are no reported opinions in this case.

JURISDICTION

The order sought to be reviewed was entered by the Superior Court of Fulton County, Georgia on May 31, 1994. The petition for writ of certiorari to the Supreme Court of Georgia was denied on November 3, 1994. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

This petition involves the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States of America.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITIONS BELOW

On October 27, 1993 Petitioner Beverly Joan Carlisle, as next friend of Angela Carlisle, filed an action against Respondent Dr. John Munna for a determination of paternity, award of child support and other relief (Civil Action File No. E-21642, In the Superior Court of Fulton County, State of Georgia). Along with the complaint, Petitioner served discovery requests to Respondent, including a notice to produce and request for production of documents.

On December 29, 1993 Respondent served his response to Petitioner's Notice to Produce and Request for Production of Documents. In that response, Respondent objected generally to the scope and reach of the production. Further, Respondent made two specific objections concerning the scope of the request for production of documents by claiming: (1) recovery for child support for the period prior to any adjudication of paternity would be limited to *amounts actually expended* by the mother for the support of the child, and therefore, with respect to back child support Petitioner's entitlement would be limited by evidence she would have within her

control and would not be dependent on Respondent's financial circumstances, and (2) recovery for prospective support, i.e., support from the time of adjudication of paternity until such time as the child is no longer entitled to support, is based under Georgia law on the statutory guidelines and geared to current income and financial circumstances of the parties so that Petitioner should only be allowed to inquire as to Respondent's financial circumstances from the period from and after an adjudication of paternity.

Petitioner's counsel sent a letter to Respondent's counsel pursuant to Georgia Uniform Superior Court Rule 6.4(B) on January 27, 1994, seeking to resolve Respondent's objections to document production. When the matter was not resolved, Petitioner filed a motion to compel on or about March 30, 1994. Concerning the objection to production of financial documents for the period prior to the date of adjudication of paternity, Respondent replied to the motion to compel by citing *Weaver v. Chester*, 195 Ga. App. 471, 393 S.E.2d 715 (1990) which allows a mother back child support only for necessaries actually furnished to the child of the parents who are not married. In response, Petitioner filed a Supplemental Brief in Support of Plaintiff's Motion to Compel the Production of Documents on May 10, 1994, which at page 3 argued:

> "There is no rational basis for treating the children born out of wedlock differently from those born in wedlock. Children in either situation are entitled to be supported consistent with the ability of a non-resident parent. To do otherwise, would be to violate the equal protection clause

> of Amendment XIV, Section I of the Constitution of the United States of America and of Article I, Section I, Paragraph II of the Constitution of the State of Georgia."

Counsel for Petitioner also orally argued that the standard of *Weaver v. Chester* violates the Equal Protection Clauses of the Constitution of the United States of America and the Constitution of the State of Georgia at the hearing on May 12, 1994. (Transcript of hearing, pp. 9-10.)

Petitioner also pointed out to the trial court that although the narrow issue before the court was a motion to compel the production of documents, the motion would be determinative of the amount of recovery Petitioner would be able to seek for retroactive child support. Petitioner argued that by denying her the right to receive evidence of Respondent's past financial condition the trial court would be precluding Petitioner from recovering retroactive child support based in whole or in part on Respondent's ability to pay prior to the adjudication of paternity.

On May 31, 1994, the trial court entered an Order denying Petitioner's Motion to Compel the production of documents.

On June 2, 1994 the trial court entered its Certificate for Immediate Review of its May 31, 1994 Order. Petitioner then timely filed a Notice of Appeal with the Supreme Court of the State of Georgia and on June 24, 1994, filed her Application for Discretionary Appeal. In that Application, Petitioner again specifically raised the issue of whether the trial court's Order, relying on *Weaver v. Chester,* violates the Equal Protection Clauses of the

Constitution of the State of Georgia and the Constitution of the United States of America. (Application filed June 10, 1994, with the Supreme Court of the State of Georgia, pp. 2, 4-13, 16). On June 24, 1994, the Supreme Court of the State of Georgia transferred the appeal to the Court of Appeals of the State of Georgia.

On July 6, 1994, the Court of Appeals of the State of Georgia denied Petitioner's Application for Discretionary Appeal. After Petitioner timely filed a Motion for Rehearing and Reconsideration, the Court of Appeals for the State of Georgia denied that motion on July 28, 1994.

On August 15, 1994, Petitioner timely filed a petition for writ of certiorari to the Supreme Court of the State of Georgia seeking review of the denial of Petitioner's Application for Discretionary Appeal by the Court of Appeals for the State of Georgia. In that petition for writ of certiorari, Petitioner again argued that the trial court's Order violates the Equal Protection Clauses of the Constitution of the State of Georgia and the Constitution of the United States of America. (Petition for Writ of Certiorari to the Supreme Court of the State of Georgia, pp. 3, 5, 11-12, 19).

On November 3, 1994, the Supreme Court of the State of Georgia denied Petitioner's petition for writ of certiorari. Petitioner asserts this timely petition for Writ of Certiorari and this Court has jurisdiction pursuant to 28 U.S.C. § 1257.

B. FACTS

Respondent is the biological father of a minor child, Angela Carlisle, born on May 4, 1976 as a result of a sexual union between Petitioner and Respondent. However, Respondent has not provided for any support or care for Angela Carlisle since her birth.

Petitioner filed this action on behalf of the child seeking a determination of paternity, an award of child support, and other relief. During the course of the litigation, Respondent stipulated to being the father of Angela Carlisle.

Petitioner served Respondent with document requests relating to Respondent's financial circumstances since the birth of the child. However, Respondent objected generally to the scope and reach of the request for production. Respondent specifically claimed that recovery for child support for the period prior to any adjudication of paternity would be limited to amounts actually expended by the mother for the support of the child and, therefore, any evidence on that issue would be in the control of Petitioner and would not be dependent on Respondent's financial circumstances. As a result, Respondent refused to provide evidence concerning his financial circumstances before the stipulation of paternity (effective January 26, 1994).

Petitioner urged the trial court that denial of the motion to compel would prevent her from seeking recovery of retroactive child support based on Respondent's ability to pay, since such evidence would not be discoverable if the motion were denied. Petitioner further argued that denial of the motion to compel would result in an

Equal Protection violation by denying Petitioner the right to recover retroactive child support on behalf of the child in the same manner as accorded legitimate children generally, solely on the basis of the child's illegitimate status.

The trial court denied Petitioner's motion to compel such evidence based upon Respondent's citation of *Weaver v. Chester,* 195 Ga. App. 471, 393 S.E.2d 715 (1990). Petitioner appealed that denial based on the Equal Protection Clause of the Constitution of the United States of America as well as the Equal Protection Clause of the Constitution of the State of Georgia.

REASONS FOR ALLOWING THE WRIT OF CERTIORARI

I. THE SUPREME COURT OF THE UNITED STATES OF AMERICA HAS REPEATEDLY HELD THAT CLASSIFICATIONS WHICH INVIDIOUSLY DISCRIMINATE ON THE BASIS OF THE ILLEGITIMACY OF A PERSON ARE SUBJECT TO HEIGHTENED SCRUTINY.

In *Clark v. Jeter,* 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed. 2d 465 (1988) the United States Supreme Court followed the standard established by *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 175, 92 S.Ct. 1400, 1406, 31 L.Ed. 2d 768 (1972) that classifications which distinguish between legitimate and illegitimate children must withstand intermediate scrutiny under the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., Amdt. 14, §1, by being substantially related to an important governmental objective. Applying that standard, the U.S.

Supreme Court struck down a six-year statute of limitations for paternity actions under Pennsylvania law, where in a number of circumstances Pennsylvania allowed litigation of paternity more than 6 years after the birth of an illegitimate child.

The *Clark v. Jeter* decision followed a series of rulings in which the United States Supreme Court applied the Equal Protection Clause of the Fourteenth Amendment to strike down statutes which invidiously discriminated against illegitimate children. In *Gomez v. Perez,* 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed. 2d 56 (1973) the Supreme Court followed previous cases by holding:

> Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded to children generally. We therefore hold that *once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.* For a State to do so is 'illogical and unjust.' (Emphasis added).

Id at 93 S.Ct. 872, 875, citing *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 175, 92 S.Ct. 1400, 1406, 31 L.E.2d 768 (1972). As a result, this Court in *Gomez* struck down the order of the Texas trial judge denying support to an illegitimate child. During oral argument the attorney for the State of Texas conceded that but for the fact that the child was illegitimate she would have been entitled to support under the laws of Texas.

In *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed. 2d 31 (1977) the Supreme Court found that a classification in the Illinois Probate Act which allowed children born out of wedlock to inherit by intestate succession only from their mothers denied equal protection of the laws, where Illinois law also provided that children born in wedlock may inherit by intestate succession from both their mothers and their fathers. In so doing, the court found that the classification did not even bear some rational relationship to any legitimate state purpose.

In *Mills v. Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed. 2d 770 (1982) the Supreme Court, following *Gomez*, struck down a one-year limitation period for filing paternity actions in Texas. In so doing, the court agreed with the appellant that the statute imposed a burden on illegitimate children not shared by legitimate children which was not substantially related to a legitimate state interest.[1]

---

[1] The Supreme Court held that the fact that Texas must provide illegitimate children with a bona fide opportunity to obtain paternal support does not mean that it must adopt procedures for illegitimate children that are coterminous with those accorded legitimate children. The Supreme Court explained, though, that paternal support suits on behalf of illegitimate children contain an element that suits for legitimate children do not contain: proof of paternity. The Supreme Court's focus on the issue at hand then found that the interest of the state in preventing the prosecution of stale or fraudulent claims in order to ensure proof of paternity still did not justify the additional burden on illegitimate children of the one-year statute of limitations.

Also, in *Pickett v. Brown*, 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed. 2d 372 (1983) the Supreme Court held that a Tennessee statute imposing a two-year limitation on paternity and child support actions on behalf of certain illegitimate children denied those children equal protection. The court cited numerous cases since 1968 in which classifications based on illegitimacy were held invalid. *Pickett v. Brown*, 103 S.Ct. at 2203.

The Supreme Court of the United States of America has clearly held that classifications based upon the illegitimate status of a child must survive a heightened scrutiny under the analysis of the Equal Protection Clause of the Fourteenth Amendment. The Court has noted that children born out of wedlock have been historically the targets of invidious discrimination based solely upon their status at birth, which is illogical and unjust. Pursuant to this line of cases, the classification in Georgia law which denies a child born out of wedlock the same ability to recover retroactive child support for a child born in wedlock must be substantially related to an important governmental objective if it is not to be a denial of the Equal Protection Clause under the Fourteenth Amendment.

II. THE CLASSIFICATION UNDER O.C.G.A. § 19-11-14, AS EXPRESSED IN *WEAVER V. CHESTER*, INVIDIOUSLY DISCRIMINATES AGAINST ILLEGITIMATE CHILDREN AND IS NOT SUBSTANTIALLY RELATED TO ANY IMPORTANT GOVERNMENTAL OBJECTIVE.

In *Weaver v. Chester*, 195 Ga. App. 471, 393 S.E.2d 715 (1990) the Court of Appeals of the State of Georgia relied on O.C.G.A. § 19-11-14 to find that in a paternity action a

father is obligated to pay back support to the mother for those periods prior to the adjudication of paternity. In so holding, the court cited O.C.G.A. § 19-11-14(a), which provides:

> "Whenever a man has been adjudicated by a court of competent jurisdiction as the father of a child born out of wedlock or whenever he has acknowledged paternity under oath in an administrative hearing, in court, or by verified writing, he shall be legally liable for the support of the child in the same manner as he would owe the duty of support if the child were his child born in wedlock. The right of the child born out of wedlock to receive such support in enforceable in a civil action, notwithstanding any other provision of law."

Thus, O.C.G.A. § 19-11-14 on its face obligates fathers of children born out of wedlock to provide support in the same manner as if the child was born in wedlock. However, the court in *Weaver* rejected the mother's contention that the amount of back support to which she is entitled is to be measured by the father's ability to pay rather than by the expenses actually incurred by her on the child's behalf. In so doing, the court cited O.C.G.A. § 19-6-13 which provides "[U]ntil otherwise provided voluntarily or by decree or order of a court, [parents] are liable to third persons for the board and support and for all necessaries furnished to or for [their] children." *Id.* at 718. The court then cited *Smith v. Smith,* 136 Ga. 531, 71 S.E. 869 (1911) and *Brown v. Brown,* 132 Ga. 712, 64 S.E. 1092 (1909) as holding that O.C.G.A. § 19-6-13 applies only to parents of illegitimate children. Thus, the court found that although children of legitimate parents are

entitled to back child support based upon the needs of the child and the parent's ability to pay under Georgia law, illegitimate children are only entitled to back child support for amounts actually expended by the mother.

In a divorce action, the parties and their children typically reside together and provide support for the child, either monetarily or through services, until the parties separate. Following the separation, a divorce action is filed and a temporary hearing occurs. O.C.G.A. § 19-6-3. At the temporary hearing, the trial court in Georgia is authorized to award child support retroactive to the date of the parties' separation. *Shepherd v. Shepherd,* 231 Ga. 257, 260, 200 S.E.2d 893 (1973); *Hobbs v. Hobbs,* 158 Ga. 571, 574, 123 S.E. 891 (1924); *Killingsworth v. Killingsworth,* 148 Ga. 590, 97 S.E. 539 (1918). In other words, the trial court is vested with the authority to require a child born *within* wedlock to be supported by both parents retroactive to the date that one of the parents in fact ceases to support the child. The criteria for determining the amount include, *inter alia,* the other spouse's ability to pay. O.C.G.A. § 19-6-15; *see generally, McConaughey, Georgia Divorce, Alimony and Child Custody,* (1993 Ed), § 8-5.

In the context of a paternity action, the parents are typically not residing together at the time the child is born. They will certainly have been separated for some time prior to the adjudication of paternity. In this case, Angela Carlisle is now eighteen (18) years of age and the parties have never resided together.

The classification under current Georgia law which entitles legitimate children to greater child support than

illegitimate children is not substantially related to any important governmental objective. Moreover, there is no rational basis for treating children born out of wedlock differently from those born in wedlock. Children in either situation are entitled to be supported consistent with the ability of the non-resident parent. In fact, in *Mabry v. Tadlock*, 157 Ga. App. 257, 277 S.E. 2d 688, 689 (1981) the Court of Appeals of the State of Georgia held "a father's duty to support his minor children is the same whether they are legitimate or illegitimate." This statement is consistent with the language of O.C.G.A. § 19-11-14, cited in *Weaver.* See page 8, supra.

To do otherwise would be to violate the Equal Protection Clause of the Fourteenth Amendment. As stated by the Supreme Court in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-176, 92 S.Ct. 1400, 1406-1407, 31 L.Ed. 2d 768 (1972):

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual – as well as an unjust – way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where – as in this case – the

classification is justified by no legitimate state interest, compelling or otherwise.

The fact that the holding in *Weaver v. Chester* is not substantially related to any important governmental objective is demonstrated by analysis of the logic of that case.

Weaver holds that in determining back child support, the finder of fact should ignore the father's income and base an award of child support upon the amount that the mother actually spent. To illustrate how flawed this holding is, if one assumes that the mother earns $500,000 per year and is willing to spend $10,000 per month on a child whose father earns $5,000 per year, then the father could be obligated to pay $5,000 per month in child support, (one-half of the amount actually spent on the child), which would equal his gross income for the entire *year.*

If, on the other hand, one assumes that the mother makes only $5,000 per year and is only able to spend $200 per month on the child, then the father's obligation would be limited to paying $100 per month notwithstanding the fact that the father's income might be as high as $500,000 per year.

In the first illustration the father is inappropriately penalized. In the second illustration, the child and the mother, who shoulders a disproportionate portion of the burden of supporting the child, are penalized. Each illustration runs contrary to the fundamental purpose of the law which is to insure that equity is done in each instance. The second illustration runs contrary to the principle of *parens patriae* and the court's obligation to

insure the welfare of children who are unable to protect themselves.

In addition, the holding in *Weaver v. Chester* presents an impossible proof burden on the mother seeking an award of retroactive child support. According to current Georgia law, Petitioner would have to try to reconstruct and prove actual expenses she incurred on behalf of the parties' child over the past eighteen (18) years. This standard presents a tremendous burden which is not placed on the mother of a child born in wedlock.

Recognizing this failure of logic, the court in *Fowhand v. Piper,* 611 So. 2d 1308 (Fla. App. 1 Dist. 1992) rejected the argument that past child support in a paternity case should be limited solely to amounts actually expended by the mother on behalf of the child. The court stated "Such a rule would limit the parent who had not the means to provide adequately for her child to recover an amount that would obviously be less than a reasonable child support obligation, thus unfairly depriving the child." *Id.* at 1312. The court, noting that Florida law recognizes that support rights of illegitimate children are the same as those of legitimate children, affirmed the trial court's award of past child support based upon the child's needs and the ability of each parent to pay. In so doing, the Court stated "We regard the obligation to support one's child as arising from something somewhat more sacrosanct than a contract" based on a father's "duty to nurture, support, educate and protect his child . . . imposed and conferred by the laws of nature." *Fowhand* at 1312 citing *State ex rel. Airston v. Bollinger,* 88 Fla. 123, 101 So. 282, 283 (1924). Previously, in *Mason v. Reiter,* 564 So. 2d 142, 144-145 (Fla. 3d DCA 1990) the court upheld an

award of retroactive child support in a paternity case based upon the child's needs and ability of the parents to pay, citing *Gomez v. Perez*, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed. 2d 56 (1973).[2]

The *Weaver* decision did not undertake an equal protection analysis of whether illegitimate children are entitled to the same right to support as legitimate children. Instead, the court transmuted a principle that makes third parties liable for necessaries furnished to children into a principle which limits retroactive child support for illegitimate children to the amount of money actually spent by the mother on the child. Were the mother of a quadriplegic incapable of furnishing any support for the child, the *Weaver* holding would leave the child with no support whatsoever since its holding makes the father only vicariously liable.

The law in Georgia requires parents to support their children and specifically extends the duty of support to fathers of illegitimate children. Georgia law also provides that the obligation is the same whether the child is born in or out of wedlock. There is no basis, rational, or otherwise, for penalizing Angela Carlisle solely because she was born out of wedlock by denying her the same right to support accorded children born in wedlock.

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[2] The Florida court in *Fowhand* criticized a sister court in Florida which allowed retroactive recovery of child support based upon the theory of reimbursing the mother for amounts actually expended. *Fowhand* at 1311-1312 citing *Valdez v. Lambert*, 568 So. 2d 117 (Fla. 5th DCA 1990) and *Williams v. Johnson*, 584 So. 2d 90, 91 (Fla. 5th DCA 1991). Previously, one other sister court in Florida allowed retroactive child support in a paternity action based upon the child's needs and the father's ability to pay. *Pensa v. Sklinar*, 547 So. 2d 284, 285 (Fla. 2d DCA 1989).

Moreover, this classification is not substantially related to any important governmental objective.

Therefore, retroactive child support in a paternity action should be awarded on the same basis as that upon which support is accorded to legitimate children: the child's needs and the father's abilty to pay based upon statutory guidelines. The trial court's order denying Petitioner the right to receive documentary evidence of Respondent's past financial condition effectively precludes Petitioner from recovering retroactive child support in the same manner allowed legitimate children. Thus, the trial court's order, and the law upon which it is based, violates the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,
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IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

BEVERLY JOAN CARLISLE, as Next Friend of ANGELA CARLISLE, Plaintiff, V. JOHN MUNNA, Defendant.	:	CIVIL ACTION FILE NO. E-21642 (Filed May 31, 1994)

ORDER

Plaintiff's Motion To Compel the Production of Documents having come before this Court for a hearing on May 11, 1994, and the arguments and briefs of counsel for the Parties having been reviewed and considered, it is hereby

ORDERED that said Motion is denied.

This 31st day of May 1994.

/s/ William W. Daniel
William W. Daniel,
Chief Judge
Superior Court of
Fulton County

Presented by:

/s/ Kirby L. Turnage
Kirby L. Turnage
Attorney for Defendant
State Bar No. 718800

Approved as to form:

/s/ John P. Wilson III
John P. Wilson III
Attorney for Plaintiff
State Bar No. 768675

Case No. S94D1381

SUPREME COURT OF GEORGIA

ATLANTA JUN 24, 1994

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

ANGELA CARLISLE, b/n/f V. JOHN MUNNA

From the SUPERIOR COURT of FULTON County.

It appearing that the subject matter of this application for appeal is within the jurisdiction of the Court of Appeals, it is ordered that it be hereby transferred to that Court.

ALL the Justices concur.

[SEAL]

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court affixed the day and year last above written.

/s/ Lynn M. Stinchcomb, Deputy Clerk.

Court of Appeals

of the State of Georgia

ATLANTA, JULY 06, 1994

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

APPLICATION NO. A94D0274

ANGELA CARLISLE B/N/F BEVERLY JOAN CARLISLE V. JOHN MUNNA

Upon consideration of the Application for a Discretionary Appeal, it is ordered that it be hereby DENIED.

93031

E21642

[SEAL]

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JUL 6 1994

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.
/s/ William R. Martin *Clerk.*

Court of Appeals

of the State of Georgia

ATLANTA, JULY 28, 1994

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

APPLICATION NO. A94D0274

ANGELA CARLISLE B/N/F BEVERLY JOAN CARLISLE V. JOHN MUNNA

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

93-031

E21642

[SEAL]

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JUL 28 1994

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ William R. Martin *Clerk.*

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: November 03, 1994

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Atlanta GA 30305

Case No. S94C1776

BEVERLY JOAN CARLISLE, b/n/f V. JOHN MUNNA

COURT OF APPEALS CASE NO. A94D0274

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

Sherie M. Welch, Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

BEVERLY JOAN CARLISLE, as Next Friend of ANGELA CARLISLE, Plaintiff,	)	CIVIL ACTION FILE NO. E-21642 (Filed May 10, 1994)
v.	)	
DR. JOHN MUNNA, Defendant.	)	

SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS

The Plaintiff has requested a variety of financial documents some of which, such as income tax returns, deeds, intangible tax returns and financial statements, have been requested back to calendar year 1976 which is the year in which the parties' daughter was born.

Defendant has objected to the production of documents on several bases. With one exception, these bases have been addressed in Plaintiff's earlier brief. One issue raised by the Defendant that has not been addressed is the Defendant's contention that his financial records which predate an adjudication of paternity are irrelevant because, according to Defendant, *retroactive* (as opposed to prospective) child support can only be awarded based upon the amount of child support paid by the mother and not upon the father's ability to pay. In support of this position, Defendant cites *Weaver v. Chester,* 195 Ga. App.

471, 393 S.E.2d 715 (1990) which, Plaintiff concedes, does stand for this proposition.

The holding in *Weaver v. Chester,* however, is without basis in logic or in law. Plaintiff is satisfied that the Supreme Court, given an opportunity and made aware of just how erroneous this holding is, would reverse this opinion.

Plaintiff will address the logic of this holding first and then the law upon which it is based. *Weaver* holds that in determining back child support, the finder of fact should ignore the father's income and base an award of child support upon the amount that the mother actually spent. To illustrate how flawed this holding is, if we assume that the mother earns $500,000 per year and is willing to spend $10,000 per month on a child whose father earns $5,000 per year, then the father would be obligated to pay $5,000 per month in child support, (one-half of the amount actually spent on the child), which amount equals his gross income for the entire *year.*

If, on the other hand, we assume that the mother makes $5,000 per year and is only able to spend $200 per month on the child, then the father's obligation would be limited to paying $100 per month notwithstanding the fact that the father's income might be as high as $500,000 per year.

In the first illustration, the father is inappropriately penalized. In the second illustration, the child and the mother, who shoulders a disproportionate portion of the burden of supporting the child, are penalized. Each illustration runs contrary to the fundamental purpose of the court which is to insure that equity is done in each

instance. The second illustration runs contrary to the principle of *parens patriae* and the court's obligation to insure the welfare of children who are unable to protect themselves.

Now let us look at the law as it applies to the parties' situation and compare it with that which normally occurs in the setting of a divorce. In a divorce action, the parties and their children typically reside together and provide support for the child, either monetarily or through services, until the parties separate. Following the separation, a divorce action is filed and a temporary hearing occurs. At the temporary hearing, the trial court is authorized to award child support retroactive to the date of the parties' separation. *Shepherd v. Shepherd,* 231 Ga. 257, 260, 200 S.E.2d 893 (1973); *Hobbs v. Hobbs,* 158 Ga. 571, 574, 123 S.E. 891 (1924); *Killingsworth v. Killingsworth,* 148 Ga. 590(2), 97 S.E. 539 (1918). In other words, the trial court is vested with the authority to require a child born *within* wedlock to be supported by both parents retroactive to the date that one of the parents in fact ceases to support the child. The criteria for determining the amount include, *inter alia,* the other spouse's ability to pay. *See generally, McConaughey Ga. Divorce, Alimony and Child Custody,* (1993 Ed), § 8-5.

In the context of a paternity action, the parents are typically not residing together at the time the child is born. They will certainly have been separated for some time prior to the adjudication of paternity. In this case, the parties' child is almost 18 years of age and the parties have never resided together.

There is no rational basis for treating children born out of wedlock differently from those born in wedlock. Children in either situation are entitled to be supported consistent with the ability of a non-resident parent. To do otherwise, would be to violate the equal protection clause of Amendment XIV, Section 1 of the Constitution of the United States of America and of Article I, Section I, Paragraph II of the Constitution of the State of Georgia.

The "equal protection" provisions of the Georgia Constitution, though employing different phraseology than the Fourteenth Amendment, "are substantially equivalent of equal protection of the laws under the U.S. Constitution." *McDaniel v. Thomas,* 248 Ga. 632, 285 S.E.2d 156 (1981); *State of Georgia v. Sanks,* 225 Ga. 88, 166 S.E.2d 19 (1969). The Equal Protection Clause is aimed at all official actions, not just those of state legislatures. *Columbus Board of Education v. Penick,* 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed. 2d 666, *rehearing denied* 444, U.S. 887, 100 S.Ct. 186, 62 L.Ed. 2d 121, *on remand* 519 F.Supp. 925, *affirmed,* 663 F.2d 24 (1979). *See also McDaniel v. Thomas, supra,* (equal protection attack on existing system of financing public education); *Ponder v. Fulton-DeKalb Hospital Authority,* 256 Ga. 883, 353 S.E.2d 515 (1987) (equal protection attack on Georgia's case law Charitable Immunity Doctrine). Moreover, in addition to state action by the Court of Appeals and the State of Georgia, this interpretation of this principle of law, such interpretation flows from the state action bodied [sic] in the state's child support statutes.

The state constitutional right to equal protection extends equally to children as well as to adults. *In the interest of S.H.,* 204 Ga. App. 135, 418 S.E.2d 454 (1992).

Specifically, in *Moores v. Richardson*, 346 F.Supp. 494 (N.D.Ga. 1972), *vacated on other grounds*, 409 U.S. 464, 93 S.Ct. 629, 34 L.Ed. 2d 647 (1973), the court found unconstitutional a federal Social Security Act statute which allows illegitimate children to receive survivors' benefits only from the residual benefits, if any remaining after the insured's surviving legitimate children received their maximum shares, since discrimination between legitimate and illegitimate children under the statute bore no rational connection with the purposes of the social security act. *See also, Tolbert v. Murrell*, 253 Ga. 566, 322 S.E.2d 487 (1984) (Georgia's wrongful death statute unconstitutionally discriminated on the basis of decedent's sex; children have the right to sue for the wrongful death of their father as well as for their mother).

Weaver cites as authority for its holding the cases of *Smith v. Smith*, 136 Ga. 531, 71 S.E. 869 (1911) and *Brown v. Brown*, 132 Ga. 712, 64 S.E. 1092 (1909). The *Brown* case is eighty-five years old. The "recent" case, the *Smith* case, is an eighty-three year old case.

Reliance upon law which predates World War I in this particular context in a society which seems to change at an exponential rate, is wholly misplaced.

There was a time in American society when merchants would extend credit and provide goods to the mothers of children based upon the father's liability under the law to reimburse them, small communities in which everyone knew each other and judicial systems in which a party did not have to go bankrupt in trying to recover a relatively modest amount from a father. In the present day and age of credit cards, credit bureaus, and

personal banking institutions, national rather than corner grocers and merchants that are not neighbors but multi-national conglomerates, reliance upon a system of doing business that expired several generations ago and a law that is a reflection upon that way of life is misplaced.

Further, the Court of Appeals took a principle that made third parties liable for necessaries furnished to children and transmuted that into meaning the same thing as the amount of money actually spent by the mother on the child. Were the mother a quadriplegic incapable of furnishing any support for the child, the Court of Appeals' holding would leave the child with no support whatsoever since the Court of Appeals' holding makes the father only vicariously liable.

This Court and the Supreme Court of Georgia should announce in unmistakable terms, that the father of a child born out of wedlock who makes $300,000 or $400,000 per year, as does the Defendant, Dr. Munna, in this case, should not and cannot escape his moral obligation to support a child that he conceived, of his own volition, outside his own marriage. This child, and every other child born out of wedlock should be supported consistent with the father's abilities and not consistent with the abilities of a woman whose earning potential and abilities are handicapped by the demands that raising and nurturing a child, cooking her meals, shopping for her clothes, taking her to the doctor, dentist and extracurricular activities, and caring for her when she is sick, would impose upon the mother over the years.

The child who is the subject of this suit is entitled to be supported by her father, who admits to his paternity,

to the same extent as any other child whom Defendant permitted to be conceived as a result of the Defendant's decision to engage in sexual intercourse.

Respectfully submitted,

WEINSTOCK & SCAVO, P.C.

By: /s/ Michael Weinstock
Michael Weinstock
Georgia Bar No. 746454

By: /s/ John P. Wilson, III
John P. Wilson, III
Georgia Bar No. 768675

Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel for all interested parties in the foregoing matter with a true and accurate copy of:

SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS

by facsimile and by depositing same in the United States Mail, postage prepaid, addressed to:

Kirby L. Turnage, Jr., Esq.
999 Peachtree Street
Suite 1750
Atlanta, Georgia 30309

This 10 day of May, 1994.

WEINSTOCK & SCAVO, P.C.

/s/ John P. Wilson, III
John P. Wilson, III

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IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

BEVERLY JOAN CARLISLE ANGELA CARLISLE PLAINTIFFS VERSUS JOHN MUNNA, DEFENDANT.	)	CIVIL ACTION FILE NO.: E-21642

* * *

TRANSCRIPT OF PROCEEDINGS IN THE ABOVE-ENTITLED AND NUMBERED CAUSE, HEARD BEFORE THE HONORABLE WILLIAM W. DANIEL, FULTON COUNTY, GEORGIA, ON MAY 11, 1994.

* * *

APPEARANCES:

ON BEHALF OF THE PLAINTIFFS:	JOHN P. WILSON, III, ATTORNEY AT LAW
ON BEHALF OF THE DEFENDANT:	KIRBY L. TURNAGE, ATTORNEY AT LAW

CHRISZANIER D. REID, CCR NO. B-1092
OFFICIAL COURT REPORTER
ATLANTA, FULTON COUNTY, GEORGIA

PROCEEDINGS

MAY 12, 1994

(WHEREUPON, DURING SAID PROCEEDINGS THE FOLLOWING OCCURRED:)

MR. WILSON: YOUR HONOR, MAY I PROCEED?

THE COURT: SPEAK INTO THE MICROPHONE, IF YOU WILL. IT HELPS THE COURT REPORTER AS WELL AS THE JUDGE.

MR. WILSON: YES, SIR. MAY I PROCEED, YOUR HONOR?

THE COURT: YOU MAY.

MR. WILSON: YOUR HONOR, I'M JOHN WILSON. I'M HERE ON BEHALF OF THE PLAINTIFF, ANGELA CARLISLE, WHO IS THE CHILD OF THE PARTIES. BY WAY OF BACKGROUND, THIS IS A PATERNITY ACTION. THE ISSUE BEFORE THE COURT THIS MORNING IS, THIS IS A MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS. IT'S A RELATIVELY DISCRETE ISSUE ALTHOUGH IT GOES TO REALLY THE HEART OF THE CASE BECAUSE WHEN THE COURT RULES WITH RESPECT TO THE SCOPE OF DISCOVERY WHICH WILL BE ALLOWED, THE COURT WILL IMPLICITLY BE DETERMINING THE AMOUNT OR THE NATURE OF THE AWARD OF DAMAGES OR RECOVERY THAT THE PLAINTIFF WILL BE ABLE TO SEEK ULTIMATELY IN THIS CASE.

THE BACKGROUND IS THAT THE PLAINTIFF FILED A NOTICE TO PRODUCE AND REQUEST FOR PRODUCTION OF DOCUMENTS IN THIS ACTION. WE DID NOT -- WE RECEIVED AN OBJECTION. WE DID NOT RECEIVE ANY DOCUMENTS ALTHOUGH MR. TURNAGE HAD PROVIDED US WITH DOCUMENTS PREVIOUSLY WHEN THIS CASE WAS PENDING ON AN EARLIER OCCASION. THE MOTION IS SEEKING DOCUMENTS IN ADDITION TO THOSE THAT WERE PREVIOUSLY PRODUCED TO US AND THOSE WOULD

CONSIST OF TAX RETURNS GOING BACK TO THE DATE THAT THE CHILD IS CONCEIVED. DEEDS THAT WOULD GO BACK TO THAT POINT IN TIME –

THE COURT: WHY DO YOU NEED THE TAX RETURNS?

MR. WILSON: OKAY. IN ORDER TO DEMONSTRATE WHAT THE FATHER'S INCOME WAS DURING THAT PERIOD OF TIME. AND THE REASON – I DON'T KNOW IF THE COURT HAS HAD AN OPPORTUNITY – AND I APOLOGIZE FOR THE LATEST OF IT – BUT WE FILED A SUPPLEMENTAL BRIEF YESTERDAY. I HAND DELIVERED A COPY TO THE COURT YESTERDAY. I HAVE AN ADDITIONAL COPY, IF I COULD, THAT I WOULD BE HAPPY TO PROVIDE THE COURT.

THE COURT: I HAVE A SUPPLEMENTAL BRIEF IN –

MR. WILSON: IN SUPPORT OF –

THE COURT: – IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS FILED MAY THE 10TH.

IS THAT IT?

MR. WILSON: YES, SIR.

THE COURT: I HAVE IT HERE.

MR. WILSON: OKAY. THE GIST OF THE ISSUE IS THIS. THE DEFENDANT CONTENDS THAT, IN TERMS OF THE RECOVERY OF CHILD SUPPORT, PREDATES AN ADJUDICATION OF PATERNITY. IN OTHER WORDS, RETROACTIVE CHILD SUPPORT. THE

DEFENDANT CONTENDS THAT THE CHILD IS LIMITED TO A RECOVERY THAT'S BASED UPON THE AMOUNT OF SUPPORT ACTUALLY PROVIDED TO THE CHILD BY THE MOTHER. AND THAT POSITION IS BASED UPON THE CASE, WEAVER VERSUS CHESTER, WHICH IS CITED BY BOTH PARTIES.

THE COURT: WHERE IS THAT CASE FOUND?

MR. WILSON: 195 GEORGIA APPEALS 471. 393 SE2ND –

THE COURT: I DON'T NEED THE SOUTHEASTERN CITATION.

MR. WILSON: YES, SIR, OKAY.

IT'S A COURT OF APPEALS CASE, AND I CANDIDLY AND OPENLY CONCEDE THAT THAT IS INDEED WHAT THAT CASE SAYS.

THE COURT: WHAT DOES THAT CASE SAY NOW?

MR. WILSON: IT SAYS THAT IN TERMS OF DETERMINING AN APPROPRIATE AWARD OF RETROACTIVE CHILD SUPPORT – PAST CHILD SUPPORT – THAT THE STANDARD FOR DETERMINING THE AMOUNT OF THAT CHILD SUPPORT IS BASED UPON THE AMOUNT ACTUALLY PROVIDED BY THE MOTHER WITHOUT LOOKING AT THE AMOUNT THAT COULD HAVE BEEN PROVIDED BY THE FATHER. IN OTHER WORDS, IF YOU HAVE A MOTHER – AND THIS GOES TO THE ILLOGICAL BASIS OF THIS HOLDING – IF YOU HAVE A MOTHER WHO EARNS FIVE THOUSAND DOLLARS A YEAR

AND ALL SHE'S ABLE TO PROVIDE IS TWO HUNDRED DOLLARS A MONTH IN FACT, FOR THE CHILD, THEN THE FATHER'S OBLIGATION, UNDER THIS WEAVER VERSUS CHESTER HOLDING, WOULD BE LIMITED TO HALF OF THE AMOUNT SHE ACTUALLY PAID, A HUNDRED DOLLARS, EVEN IF THE FATHER WAS MAKING THREE OR FOUR HUNDRED THOUSAND DOLLARS A YEAR AS IS CURRENTLY IN THE CASE WITH DR. MUNNA. SO THE CHILD WOULD BASICALLY LIVE IN A SITUATION OF POVERTY EVEN THOUGH THE FATHER WAS A VERY, VERY WEALTHY PERSON. YOU CAN PUT THE SHOE ON THE OTHER FOOT AND DEMONSTRATE THAT IT IS EQUALLY ILLOGICAL GOING IN THE OPPOSITE DIRECTION. IF THE MOTHER IS EARNING, LET'S SAY, FIVE HUNDRED THOUSAND DOLLARS A YEAR AND SHE WANTS TO SEND THE CHILD TO VERY EXPENSIVE PRIVATE SCHOOLS AND MONEY IS NO OBJECT AND SHE JUST POURS THE MONEY ON THIS CHILD AND SPENDS TEN THOUSAND DOLLARS A MONTH ON THE CHILD AND IF YOU ASSUME HYPOTHETICALLY SPEAKING THAT THE FATHER NOW IS THE ONE WHO IS EARNING FIVE THOUSAND DOLLARS A YEAR AND HIS OBLIGATION IS FOR ONE HALF OF THE AMOUNT ACTUALLY SPENT BY THE MOTHER EVEN THOUGH THE AMOUNT BEING SPENT PER MONTH IS TWICE WHAT HE'S EARNING ON AN ANNUAL BASIS. SO THERE'S NO LOGICAL RELATIONSHIP IN THE APPLICATION OF THIS STANDARD TO A PARTICULAR SET OF FACTS.

THE COURT: WELL, DO YOU MEAN THAT IF I DON'T THINK A DECISION OF THE COURT OF

APPEALS IS CORRECT I DON'T' HAVE TO FOLLOW IT?

MR. WILSON: WELL . . .

THE COURT: I'VE ALWAYS FIGURED THOSE CASES WERE REAL PERSUASIVE EVEN WHEN THEY DIDN'T MAKE SENSE.

MR. WILSON: WELL, YOUR HONOR WOULD KNOW BETTER THAN I DO, THE EXTENT IN WHICH YOUR HANDS ARE TIED BY THIS OPINION BUT I HAVE TO POINT OUT TO YOU –

THE COURT: I UNDERSTAND. YOU GO AHEAD.

MR. WILSON: I HAVE TO POINT OUT TO YOU WHAT I SEE AS BEING THE INJUSTICE THIS OPINION INADVERTENTLY HAS CREATED. I DON'T THINK THAT THE COURT OF APPEALS REALLY REALIZES IN PRACTICE THE PROBLEMS THAT THIS HOLDING GENERATES. THE HOLDING ITSELF IS BASED UPON A STATUTE WHICH SAYS THAT THE PARENTS ARE RESPONSIBLE FOR THE NECESSARIES OF A MINOR CHILD. AND THAT STATUTE IS PROBABLY A COUPLE OF HUNDRED YEARS OLD. THE LAST TIME I HEARD ABOUT IT WAS BACK WHEN THE WAR CAME DOWN AROUND 1979 AND WE WERE DEGENDERIZING ALL OF OUR STATUTES; AND AT THAT TIME, IF MEMORY SERVES ME, IT SAID THAT THE FATHER IS LIABLE FOR THE NECESSARIES. I THOUGHT THEY WERE GOING TO JUST REPEAL THE LAW SINCE IT'S A REFLECTION OF A BYGONE TIME. AS I SEE NOW, WHAT THEY DID WAS THEY JUST

SAID BOTH PARENTS ARE RESPONSIBLE FOR THE NECESSARIES. THEY DIDN'T REPEAL IT. THEY JUST DEGENDERIZED IT. BUT THE POINT IS THAT THAT STATUTE IS A REFLECTION OF A DAY AND AGE THAT JUST NO LONGER EXISTS. THERE WAS A TIME WHEN THE LOCAL MERCHANT WOULD EXTEND CREDIT AND YOU COULD GO TO THE CORNER STORE AND GET NECESSARIES AND WE DON'T LIVE IN A DAY AND AGE WHERE THAT SORT OF THING GOES ON. WE DEAL IN A DAY AND AGE OF HOME DEPOT AND CUB WAREHOUSES. AND THE FACT THAT YOU WALK IN THERE AND SAY MY CHILDREN NEED NECESSARIES, THEY ARE GOING TO SAY, I'M SORRY, YOU NEED TO GO DOWN TO THE CREDIT BUREAU AND GET BETTER CREDIT. SO THAT REFLECTION – THAT STATUTE WHICH SAYS THAT PARENTS ARE RESPONSIBLE FOR THE NECESSARIES PROVIDED TO A CHILD REALLY HAS NO APPLICABILITY IN THIS DAY AND AGE AND THE FACT THAT IT GRANTS THE PROVIDERS OF THOSE NECESSARIES THE RIGHT TO SUE THE OTHER PARENT. IN OTHER WORDS, IF THE MERCHANT GIVES THE MOTHER CLOTHES OR FOOD FOR THE CHILD, UNDER THE STATUTE THE MERCHANT HAS THE RIGHT TO GO SUE THE FATHER. BUT AS A PRACTICAL MATTER MERCHANTS ARE NOT GOING TO DO THAT. THEY ARE GOING TO FIND IT EASIER NOT TO EXTEND THAT SORT OF CREDIT. IT'S TOO EXPENSIVE TO BE GOING AFTER PEOPLE. SO THE WEAVER VERSUS CHESTER CASE WAS BASED UPON THAT STATUTE AND IT ALSO CITED IN SUPPORT OF THAT STATUTE A SMITH VERSUS SMITH CASE WHICH I

MENTIONED ON PAGE FIVE OF MY BRIEF AND A BROWN VERSUS BROWN CASE WHICH I ALSO REFERENCED AND THESE DECISIONS WERE DECIDED IN 1911 AND 1909 RESPECTIVELY. THE BROWN CASE IS EIGHTY-FIVE YEARS OLD AND THE SMITH CASE IS EIGHTY-THREE YEARS OLD. THESE ARE OPINIONS WHICH PREDATE WORLD WAR ONE. IN OUR SOCIETY IT HAS CHANGED ENORMOUSLY SINCE THAT TIME. SO I DON'T THINK THAT THESE AUTHORITIES ACCURATELY REFLECT WHAT SHOULD BE THE PUBLIC POLICY OF OUR JUDICIAL SYSTEM AT THIS TIME. THE APPLICATION OF THAT STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF GEORGIA AND IT DOES SO IN THIS FASHION.

IN A DIVORCE CASE YOU HAVE TWO PARENTS AND THEY ARE RESPONSIBLE FOR SUPPORTING THE CHILD. THEY LIVE TOGETHER. THEY SEPARATE. THERE'S A TEMPORARY HEARING. AT THE TEMPORARY HEARING THE COURT CAN ENTER CHILD SUPPORT FOR THE BENEFIT OF THE MINOR CHILDREN RETROACTIVE TO THE DATE OF SEPARATION. IN OTHER WORDS, RETROACTIVE TO THE DATE THAT THE NONRESIDENT PARENT CEASED SUPPORTING THE CHILD. AND THAT'S REFLECTED IN MCCONAUGHUY [sic] AND I'VE GIVEN THE CITATION FOR THAT. AND IN DETERMINING WHAT FACTORS OR CONSIDERING WHAT CRITERIA WILL INFLUENCE THE COURT IN AWARDING THAT CHILD SUPPORT IN A DIVORCE CASE, THE COURT IS PERMITTED TO CONSIDER THE FATHER'S EARNING

CAPACITY AND HIS INCOME. ALL THE ISSUES THAT ARE NOT BEING PERMITTED TO BE CONSIDERED UNDER THIS WEAVER VERSUS CHESTER CASE. SO YOU HAVE A SITUATION WHERE LEGITIMATE CHILDREN ARE BEING SUPPORTED ON PAST CHILD SUPPORT BASED UPON THE FATHER'S ACTUAL INCOME AND ALSO HIS EARNING CAPACITY WHICH COULD EVEN BE HIGHER. AND IN THE CASE OF WEAVER VERSUS CHESTER, AND THE CHILD BORN OUT OF WEDLOCK, YOU HAD A DIFFERENT STANDARD BEING APPLIED. YOU HAD A STANDARD WHICH IS LIMITED ONLY TO THE AMOUNT THAT THE MOTHER, UNDER HER PERSONAL FINANCIAL CIRCUMSTANCES, WAS ACTUALLY ABLE TO SPEND ON THE CHILD. AND IN AN ILLEGITIMATE OR OUT OF WEDLOCK SETTING THE COURT IS NOT BEING PERMITTED TO CONSIDER THE FATHER'S INCOME OR HIS FINANCIAL STATUS. SO FOR THAT REASON WE FEEL THAT IT DOES VIOLATE THE EQUAL PROTECTION CLAUSE. THAT'S WHAT WE'VE ADDRESSED IN OUR SUPPLEMENTAL BRIEF. IN THE EARLIER BRIEF WE POINTED OUT THAT WE FEEL IT WOULD BE APPROPRIATE FOR THE COURT TO GO BACK AND PERMIT DISCOVERY OF THESE OLDER DOCUMENTS FOR OTHER REASONS. WE FEEL THAT WE'RE ENTITLED TO VERIFY THE ASSETS AND LIABILITIES THAT DR. MUNNA SAYS THAT HE DOES HAVE AT THE PRESENT TIME AND ALSO LOOK AT THE EXTENT TO WHICH IN TERMS OF PROSPECTIVE CHILD SUPPORT HE'S CAPABLE OF EARNING A LIVING AND SO WE FEEL THAT THESE DOCUMENTS WOULD BE RELEVANT ON PROSPECTIVE CHILD SUPPORT. NOW I

UNDERSTAND – I'M NOT THE LEAD COUNSEL IN THIS CASE – BUT IT'S MY UNDERSTANDING THAT THE CHILD IS GOING TO BE TURNING EIGHTEEN BEFORE LONG AND THAT WILL PRETTY MUCH ELIMINATE THE ISSUE OF PROSPECTIVE CHILD SUPPORT. BUT THAT'S OUR POSITION WITH RESPECT TO RETROACTIVE CHILD SUPPORT, YOUR HONOR.

THE COURT: ALL RIGHT, SIR. MR. TURNAGE?

MR. WILSON: IF I MIGHT ADD –

THE COURT: EXCUSE ME.

MR. WILSON: I APOLOGIZE, YOUR HONOR. IF I MIGHT ALSO ADD, I APOLOGIZE TO MR. TURNAGE FOR SERVING HIM WITH THIS BRIEF ONLY YESTERDAY. IT WAS MY INTENTION TO HAVE IT DONE PREVIOUSLY AND SOMETIMES THE BEST INTENTIONS DON'T ARRIVE, BUT HE'S INDICATED HE WOULD ASK THE COURT FOR AN OPPORTUNITY TO PROVIDE A SUPPLEMENTAL BRIEF. I HAVE NO PROBLEM WHATSOEVER WITH THAT. I WOULD ASK THE COURT TO CONSIDER ALLOWING ME TO FILE A BRIEF RESPONSE TO THAT IN THE COURT'S DISCRETION.

MR. TURNAGE: YOUR HONOR, THIS CASE HAS BEEN IN THE COURT, I BELIEVE, SINCE SOMETIME IN 1992. IT IS A VERY UNUSUAL CASE IN THAT A CHILD WAS CONCEIVED AS A RESULT OF A RELATIONSHIP BETWEEN THESE TWO ADULTS WHEN THEY WERE BOTH MARRIED TO SOMEBODY ELSE. IT WAS IN ABOUT 1976 THAT THE CONCEPTION

OCCURRED. JOHN HAD NO WAY OF KNOWING THIS, I GUESS, BUT THE CHILD HAS ALREADY TURNED EIGHTEEN AND GRADUATED FROM HIGH SCHOOL THIS MAY QUARTER. SO THE ISSUE OF PROSPECTIVE CHILD SUPPORT WHICH HAD BEEN UP ON RULE NISI ABOUT FOUR TIMES BEFORE THIS COURT AND WE HAD A HEARING ON RULE NISI IN THE FIRST CASE. THAT CASE WAS DISMISSED. THE COURT DENIED THE MOTHER'S APPLICATION FOR CHILD SUPPORT FOR REASONS I WILL TELL YOU IN JUST A MINUTE AND THEN IT'S BEEN UP THREE OR FOUR TIMES SINCE THEN AND THE CASE HADN'T BEEN REACHED ON THE CALENDAR OR MR. SCAVO – I'M SORRY –

MR. WILSON: WEINSTOCK.

MR. TURNAGE: – MR. WEINSTOCK WAS NOT AVAILABLE. IN ANY EVENT, THE MOTHER WAS MARRIED TO SOMEBODY ELSE AND THAT PERSON – THAT MAN THOUGHT HE WAS THE FATHER OF THIS CHILD FOR THOSE SIXTEEN YEARS. HE ONLY LEARNED AS A RESULT OF THIS CASE THAT HE WASN'T THE FATHER OF THE CHILD. SO THE TESTIMONY AND THE TRANSCRIPT OF THE FIRST HEARING WAS THAT THAT MAN HAD PROVIDED SUBSTANTIALLY, IF NOT, ALL OF THE SUPPORT FOR THIS YOUNG LADY. AND TESTIMONY ALSO WAS THAT MY CLIENT, DR. MUNNA, DIDN'T KNOW HE WAS THE DADDY UNTIL THIS CASE WAS FILED AND UNTIL THE BLOOD TESTS WERE PREFORMED [sic]. SO THERE MAY BE SOME SOPHISTICATED LEGAL ARGUMENTS IN RESPONSE TO THE EQUAL PROTECTION

ARGUMENT THAT I HAVEN'T THOUGHT OUT CAREFULLY AND HAVEN'T HAD TIME TO THINK OUT CAREFULLY AND IF THE COURT WANTS THOSE ADDRESSED I WOULD LIKE MORE TIME. BUT, IN FACT, WHAT WE HAVE HERE, UNDER THE LAW OF THE STATE OF GEORGIA, THAT THE CHILD SUPPORT CAN BE AWARDED IN TWO SEGMENTS. ONE IS PROSPECTIVE AFTER THE DETERMINATION OF PATERNITY. THAT'S MOOT NOW. AND THE OTHER IS RETROACTIVE BACK TO THE DATE OF BIRTH. BUT UNDER THE CLEAR STATEMENT OF THE 1990 COURT OF APPEALS, THE WEAVER CASE, THE ONLY RELEVANT ISSUE IS WHAT DID MAMA SPEND FOR THE CHILD DURING ALL THOSE YEARS BEFORE A DETERMINATION OF PATERNITY. AND MY CONTENTION IS THAT AN ATTEMPT TO DISCOVER MY CLIENT'S FINANCIAL CIRCUMSTANCES PRIOR TO THE DETERMINATION OF PATERNITY IS AN IRRELEVANT ISSUE BECAUSE IT IS NOT RELEVANT TO THE SUBJECT MATTER OF THE LAWSUIT. FURTHER, IT IS NOT CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE BECAUSE UNDER WEAVER THE FINANCIAL CIRCUMSTANCES OF MY CLIENT PRIOR TO THE DETERMINATION OF PATERNITY SIMPLY IS NOT RELEVANT TO THE SUBJECT MATTER AND THEREFORE NO EVIDENCE CAN BE ADMITTED AND THEREFORE A FISHING EXPEDITION INTO THOSE CIRCUMSTANCES IS NOT REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE.

PLAINTIFF'S BRIEF IN SUPPORT OF THE MOTION BRINGS UP THE FACT THAT WE ARE CONTENDING

THAT HE IS NOT ENTITLED TO DISCOVER EVIDENCE AND THAT OUR ARGUMENT IN SUPPORT OF THAT CONTENTION IS THAT WE ARE TRYING TO KEEP HIM FROM DISCOVERING EVIDENCE ON A FALSE PREMISE AND, THAT IS, THAT WE'RE SAYING IF THE EVIDENCE IS NOT ADMISSIBLE IT IS THEREFORE NOT DISCOVERABLE AND THAT IS CONFUSING THE ISSUE OF SUBJECT MATTER RELEVANCE WITH THE ISSUE OF EVIDENTIARY RELEVANCE. I WANT TO MAKE IT CLEAR THAT WE'RE NOT ARGUING EVIDENTIARY RELEVANCE. WE'RE ARGUING SUBJECT MATTER RELEVANCE. AND I THINK WEAVER MAKES IT CLEAR AND THAT UNTIL WEAVER IS REVERSED THE SUPERIOR COURTS WHO HAVE TO HANDLE THESE CASES HAVE TO ABIDE BY WEAVER AND THIS IS OFF LIMITS TO INQUIRY. AND THAT IS OUR CASE, YOUR HONOR. WE'RE DEALING WITH RETROACTIVE CHILD SUPPORT. THE ISSUE IS WHAT HAS MAMA PAID AND THEREFORE SHE HAS THE RELEVANT EVIDENCE IN HER HANDS AND MUST PROVE WHAT SHE HAS PAID IN ORDER TO GET AN AWARD. I WOULD LIKE TO ADDRESS ONE THING THAT MY BROTHER HAS SAID WHICH I THINK, WITH ALL DUE RESPECT, HIS LOGIC IS FLAWED AND, THAT IS, THAT IN HIS EXAMPLES THE CHILD SUPPORT IS NOT LIMITED – IT'S NOT A MATHEMATICAL CALCULATION. IT'S NOT AUTOMATIC THAT IF MAMA MAKES TWENTY THOUSAND DOLLARS A MONTH AND DADDY MAKES FIVE THOUSAND DOLLARS THAT DADDY IS GOING TO HAVE TO PAY TWENTY THOUSAND DOLLARS A MONTH. AND THE REVERSE IS

TRUE. IF DADDY IS MAKING FIVE HUNDRED THOUSAND DOLLARS A YEAR AND MAMA IS MAKING FIVE THOUSAND DOLLARS A YEAR THERE'S NO MATHEMATICAL CERTAINTY TO WHAT THE AWARD WOULD BE BECAUSE THAT WOULD BE ROBBING THE COURT OF ITS DISCRETION. AND FOR THESE AND OTHER REASONS CITED IN MY BRIEF, YOUR HONOR, I RESPECTFULLY REQUEST THAT THE COURT DENY THIS MOTION TO COMPEL AND GRANT A PROTECTIVE ORDER HOLDING THAT DISCOVERY OF DR. MUNNA'S FINANCIAL CIRCUMSTANCES PRIOR TO AN ADJUDICATION OF PATERNITY – WHICH HAS BEEN STIPULATED, BY THE WAY – IT IS NOT RELEVANT AND I WOULD USE THE DATE OF THE STIPULATION IN THIS CASE – THE SECOND CASE – AS THE DATE OF DETERMINATION OF PATERNITY. THANK YOU, YOUR HONOR.

THE COURT: WELL, WHY CAN'T I DECIDE THIS THING IN SOME WAY, GIVE YOU A CERTIFICATE OF IMMEDIATE REVIEW, AND LET AN APPELLANT [sic] COURT DECIDE WHETHER OR NOT TO APPLY THE LAW AS IT HAS EXISTED, OR WHETHER THEY WANT TO CHANGE IT?

CAN WE DO THAT? IS THAT ISSUE CLEAR ENOUGH TO FIND SO THAT WE MIGHT BE ABLE TO GET A DECISION ON THAT?

MR. WILSON: YOUR HONOR, I APPRECIATE THE COURT'S WILLINGNESS TO ENTERTAIN A CERTIFICATE OF IMMEDIATE REVIEW. MY ONLY CONCERN IS THAT, NUMBER ONE, I'M NOT LEAD COUNSEL IN THE CASE. NUMBER TWO, MY CLIENT'S

FINANCIAL CIRCUMSTANCES MAY BE SUCH THAT SHE MAY FEEL COMPELLED TO DELAY THE APPEAL UNTIL AFTER THE CASE. I UNDERSTAND EXACTLY WHAT YOU'RE SAYING AND THAT BOTH MICHAEL WEINSTOCK AND THE CLIENT MIGHT BE VERY, VERY HAPPY TO HEAR THAT THE COURT WOULD DO THAT, BUT I WOULD HOPE THE COURT WOULD UNDERSTAND MY POSITION IN THAT REGARD. THAT REQUIRES A DECISION THAT I'M NOT IN A POSITION TO MAKE. BUT I APPRECIATE THAT AND THAT MIGHT VERY WELL BE THE WAY TO HANDLE THIS ISSUE. TO GET IT OUT OF THE WAY IN EVENT OF A TRIAL.

MR. TURNAGE: THIS IS PROBABLY MOOT BUT SINCE WE HAVE A COURT REPORTER I WOULD LIKE TO SAY THAT I DON'T KNOW WHETHER THIS CASE IS APPROPRIATE FOR THE GRANTING OF A CERTIFICATE OF IMMEDIATE REVIEW ON THE ORDER THAT THE COURT WILL ENTER ON THIS MOTION. IF THE COURT ENTERTAINS THAT I WOULD LIKE TIME TO RESEARCH THAT AND PREPARE A BRIEF. CONCEPTUALLY I DON'T HAVE ANY PROBLEM WITH THE COURT DOING THAT IF THE COURT INDEED HAS THE DISCRETION TO DO THAT. I JUST SIMPLY DON'T KNOW WHAT THE GROUND RULES ARE. I WOULD LIKE TO STATE ON THE RECORD THAT IF THE COURT DOES ULTIMATELY GRANT A CERTIFICATE, I MOVE THAT THE TRANSCRIPT IN THE ORIGINAL RULE NISI HEARING BE ADDED TO THE RECORD. THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT. WELL, MR. TURNAGE – I GUESS, MR. WILSON, IT'S YOUR MOTION TO COMPEL; IS THAT RIGHT?

MR. WILSON: YES, YOUR HONOR.

THE COURT: ALL RIGHT. I'M GOING TO DENY YOUR MOTION.

MR. TURNAGE: THANK YOU, YOUR HONOR. I WILL PREPARE AN ORDER.

THE COURT: ALL RIGHT, SIR.

MR. WILSON: THANK YOU, YOUR HONOR.

(PROCEEDINGS CONCLUDED)

CERTIFICATE

STATE OF GEORGIA,

COUNTY OF FULTON:

I DO HEREBY CERTIFY THAT THE FOREGOING PAGES IS A TRUE, COMPLETE, AND CORRECT TRANSCRIPT OF THE PROCEEDINGS TAKEN DOWN BY ME IN THE CASE AFORESAID.

THIS CERTIFICATION IS EXPRESSLY WITHDRAWN AND DENIED UPON THE DISASSEMBLY OR PHOTOCOPYING OF THE FOREGOING TRANSCRIPT OR ANY PART THEREOF, INCLUDING EXHIBITS, UNLESS SAID DISASSEMBLY OR PHOTOCOPYING IS DONE BY THE UNDERSIGNED OFFICIAL COURT

REPORTER AND ORIGINAL SIGNATURE AND SEAL IS ATTACHED THERETO.

THIS, THE 8TH DAY OF August 1994.

/s/ Chriszanier D. Reid
CHRISZANIER D. REID,
CCR NO. B-1092
OFFICIAL COURT REPORTER
ATLANTA, GEORGIA 30312

IN THE SUPREME COURT
STATE OF GEORGIA

BEVERLY JOAN CARLISLE, as Next Friend of ANGELA CARLISLE,	)	CASE NO. ___
Applicant,	)	(Filed Jun. 10,
v.	)	1994)
DR. JOHN MUNNA,	)	
Respondent.	)	

APPLICATION FOR DISCRETIONARY APPEAL

I. STATEMENT OF JURISDICTION

Applicant Beverly Joan Carlisle, as Next Friend of Angela Carlisle, hereby applies for discretionary appeal of an order by the trial court denying her Motion to Compel the Production of Documents. This Court has exclusive jurisdiction pursuant to the Constitution of the State of Georgia, Article VI, Section VI, Paragraph II as this application concerns the constitutionality of a law. The Court should grant the application because reversible error exists and will cause a substantial error at trial and the establishment of a precedent is desirable.

II. ORDER SOUGHT TO BE APPEALED

Attached to this application and incorporated herein as Exhibit "A" is the Order of the trial court denying Plaintiff's Motion to Compel the Production of Documents. This Application is filed within ten (10) days of the entry by the trial court of a Certificate for Immediate

Review, a copy of which is attached hereto and by reference incorporated herein as Exhibit "B."

III. EXHIBITS ATTACHED

A. Order Denying Motion to Compel the Production of Documents.

B. Certificate of Immediate Review.

C. Complaint for Determination of Paternity, Award of Child Support and other Relief.

D. Plaintiff's Notice to Produce and Request for Production of Documents to Defendant.

E. Defendant's Response to Plaintiff's Notice to Produce and Request for Production of Documents to Defendant.

F. Plaintiff's Motion to Compel the Production of Documents and Brief in Support.

G. Supplemental Brief in Support of Plaintiff's Motion to Compel the Production of Documents.

H. Stipulation of Paternity.

IV. ISSUES PRESENTED

A. WHETHER THE TRIAL COURT'S ORDER VIOLATES THE EQUAL PROTECTION CLAUSES OF THE CONSTITUTION OF THE STATE OF GEORGIA AND THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

B. WHETHER THE TRIAL COURT'S ORDER IS AN ABUSE OF DISCRETION.

V. STATEMENT OF FACTS

On or about October 27, 1993 Applicant Beverly Joan Carlisle, as next friend of Angela Carlisle, filed an action against Respondent Dr. John Munna (Civil Action File No. E-21642, In the Superior Court of Fulton County, State of Georgia) for a determination of paternity, award of child support and other relief. Along with the complaint, Applicant served discovery requests, including a request for production of documents to Defendant.

On December 29, 1993 Respondent served his response to Applicant's notice to Produce and Request for Production of Documents. In that response, Respondent objected generally to the scope and reach of the production. Further, Respondent made two specific objections concerning the scope of the request for production by claiming: (1) recovery for child support for the period prior to any adjudication of paternity would be limited to *amounts actually expended* by the mother for the support of the child, and therefore, with respect to back child support Applicant's entitlement would be limited by evidence she would have within her control and would not be dependent on Respondent's financial circumstances, and (2) recovery for prospective support, i.e., support from the time of adjudication of paternity until such time as the child is no longer entitled to support, is based under Georgia law on the statutory guidelines and geared to current income and financial circumstances of the parties so that Applicant should only be allowed to inquire as to Respondent's financial circumstances from the period from and after an adjudication of paternity. Exhibit "E," pp. 1-2.

Applicant's counsel sent a letter to Respondent's counsel pursuant to Uniform Superior Court Rule 6.4(B) on January 27, 1994, seeking to resolve Respondent's objections to document production. When the matter was not resolved, Applicant filed motion to compel on or about March 30, 1994. After notice and hearing, the trial court denied the motion but granted a Certificate for Immediate Review.

In denying the Applicant's motion to compel, the trial court relied on the Respondent's citation of *Weaver v. Chester,* 195 Ga. App. 471, 393 S.E.2d 715 (1990) which allowed the mother back child support only for necessaries actually furnished to the child of the parents who are not married. In so doing, the trial court rejected the arguments of Applicant in her Supplemental Brief in Support of Plaintiff's Motion to Compel the Production of Documents that such a principle of law is illogical and in violation of the equal protection clauses of the Constitution of the United States of America and the Constitution of the State of Georgia.

VI. ARGUMENT AND CITATION OF AUTHORITY

A. THE TRIAL COURT'S ORDER VIOLATES THE EQUAL PROTECTION CLAUSES OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND THE CONSTITUTION OF THE STATE OF GEORGIA.

Georgia law presently provides that retroactive or back child support for an *illegitimate* child is recoverable only upon the basis of amounts actually spent by the mother whereas retroactive or back child support, in the case of *legitimate* children, is recoverable based upon

amounts actually expended and, *in addition*, the income, assets and ability to pay of the father. The issue of whether the law in the State of Georgia limiting a retroactive award of child support in a paternity action to amounts actually expended by the mother violates the equal protection clauses of the Constitution of the State of Georgia and the Constitution of the United States of America is an issue of first impression in this state. For the reasons shown below, the law as expressed in *Weaver v. Chester,* supra, is unconstitutional; therefore, the trial court's order denying production of documents relevant to the father's financial circumstances prior to this adjudication of paternity is erroneous and must be reversed.

In *Clark v. Jeter,* 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed. 2d 465 (1988) the United States Supreme Court followed the standard established by *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 175, 92 S.Ct. 1400, 1406, 31 L.Ed. 2d 768 (1972) that classifications which distinguish between legitimate and illegitimate children must withstand intermediate scrutiny by being substantially related to an important governmental objection [sic]. Applying that standard, the U.S. Supreme Court struck down a six-year statute of limitations for paternity actions under Pennsylvania law.

The *Clark v. Jeter* decision followed a series of rulings in which the United States Supreme Court applied the equal protection clause of the Fourteenth Amendment to the Constitution of the United States to strike down statutes which invidiously discriminated against illegitimate children. In *Gomez v. Perez,* 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed. 2d [sic] (1973) the U.S. Supreme Court followed previous cases by holding that

> Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded to children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is 'illogical and unjust.'

Id at 93 S.Ct. 872, 875, citing *Weber v. Etna* [sic] *Casualty & Surety Co.*, 406 U.S. 164, 175, 92 S.Ct. 1400, 1406, 31 L.E.2d 768 (1972). As a result, the U.S. Supreme Court in *Gomez* struck down the order of the Texas State trial judge denying support to an illegitimate child. During oral argument the attorney for the State of Texas conceded that but for the fact that the child was illegitimate she would be entitled to support under the laws of Texas.

In *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed. 2d 31 (1977) the United States Supreme Court held that a provision of the Illinois Probate Act which allowed children born out of wedlock to inherit by intestate succession only from their mothers, whereas children born in wedlock may inherit by intestate succession from both their mothers and their fathers, denied equal protection. In so doing, the court found that the classification did not even bear some rational relationship to any legitimate state purpose.

In *Mills v. Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed. 2d 770 (1982) the U.S. Supreme Court, following *Gomez*, struck down a one-year limitation period for filing

paternity actions in Texas. In so doing, the court agreed with the appellant that the statute imposed a burden on illegitimate children not shared by legitimate children which was not substantially related to a legitimate state interest.[1]

Also, in *Pickett v. Brown*, 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed. 2d 372 (1983) the U.S. Supreme Court held that a Tennessee statute imposing a two-year limitations [sic] on paternity and child support actions on behalf of certain illegitimate children denies those children equal protection. The Court cited numerous cases since 1968 in which, in several instances, classifications based on illegitimacy were held invalid. *Pickett v. Brown*, 103 S.Ct. at 2203.

The "equal protection" provisions of the Georgia Constitution, though employing different phraseology than the Fourteenth Amendment, "are substantially equivalent of equal protection of the laws under the U.S. Constitution." *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981); *State of Georgia v. Sanks*, 225 Ga. 88, 166 S.E.2d 19 (1969). The Equal Protection Clause is aimed at all

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[1] The Court held that the fact that Texas must provide illegitimate children with a bona fide opportunity to obtain paternal support does not mean that it must adopt procedures for illegitimate children that are coterminous with those accorded legitimate children. The court explained, though, that paternal support suits on behalf of illegitimate children contain an element that suits for legitimate children do not contain: proof of paternity. The court's focus on the issue at hand then found that the interest of the state in preventing the prosecution of stale or fraudulent claims in order to ensure proof of paternity still did not justify the additional burden on illegitimate children of the one-year statute of limitations.

official actions, not just those of state legislatures. *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed. 2d 666, *rehearing denied* 444 U.S. 887, 100 S.Ct. 186, 62 L.Ed. 2d 121, *on remand* 519 F.Supp. 925, *affirmed*, 663 F.2d 24 (1979). *See also McDaniel v. Thomas, supra*, (equal protection attack on existing system of financing public education); *Ponder v. Fulton-DeKalb Hospital Authority*, 256 Ga. 883, 353 S.E.2d 515 (1987) (equal protection attack on case law regarding Georgia's charitable immunity doctrine). The state constitutional right to equal protection extends equally to children as well as to adults. *In the interest of S.H.*, 204 Ga. App. 135, 418 S.E.2d 454 (1992). In the present case state action is present by virtue of the interpretation by the Court of Appeals of the state of Georgia of the principle of law in *Weaver* and also because such interpretation flows from the state action embodied in the state's child support and paternity statutes. O.C.G.A. §§ 19-7-24, 19-7-51, and 19-11-14.

Like the United States Supreme Court, this Court has struck down classifications which invidiously discriminated against illegitimate children. In *Poulos v. McMahan*, 250 Ga. 354, 297 S.E.2d 451 (1982) this Court, following the numerous line of United States Supreme Court decisions striking down discrimination against illegitimate children, held that Georgia's pre-1980 statutory intestacy scheme was unconstitutional because it excluded significant categories of illegitimate children whose inheritance rights could have been recognized without jeopardizing orderly administration of estates. Also, in *Edenfield v. Jackson*, 251 Ga. 491, 306 S.E.2d 911 (1983) this Court avoided finding the Georgia statute authorizing a cause of action for wrongful death for the widow of the

deceased or, if there is no widow, the children of the deceased, by holding that the statute must be interpreted as including both legitimate and illegitimate children (and in the process overruling prior case law which interpreted the statute as excluding illegitimate children from the statute). *See also, Tolbert v. Murrell,* 253 Ga. 566, 322 S.E.2d 487 (1984) (Georgia's wrongful death statute unconstitutionally discriminated on the basis of decedent's sex; children have the right to sue for the wrongful death of their father as well as for their mother).

The ruling in *Weaver v. Chester* invidiously discriminates against illegitimate children and is not substantially related to any important governmental objective. In *Weaver* the court relied on O.C.G.A. § 19-11-14 to find that in a paternity action a father is obligated to pay back support to the mother for those periods prior to the adjudication of paternity. In so holding the court cited O.C.G.A. § 19-11-14 which provides in pertinent part:

> "Whenever a man has been adjudicated by a court of competent jurisdiction as the father of a child born out of wedlock . . . he shall be legally liable for the support of the child in the same manner as he would owe the duty of support if the child were his legitimate child."

The court then held "the father's duty to support his child arises when the child is born." *Id.* at 717.

However, the court in *Weaver* rejected the mother's contention that the amount of back support to which she is entitled is to be measured by the father's ability to pay during the periods in question rather than by the expenses actually incurred by her on the child's behalf. In

so doing, the court cited O.C.G.A. § 19-6-13 which provides that "[u]ntil otherwise provided voluntarily or by decree or order of a court, [parents] are liable to third persons for the board and support and for all necessaries furnished to or for [their] children." *Id.* at 718. The court then cited *Smith v. Smith,* 136 Ga. 531, 71 S.E. 869 (1911) and *Brown v. Brown,* 132 Ga. 712, 64 S.Ed. [sic] 1092 (1909) as holding that O.C.G.A. § 19-6-13 applies only to parents of illegitimate children. Thus, the court found that although children of legitimate parents are entitled to back child support based upon the needs of the child and the parent's ability to pay, illegitimate children are only entitled to back child support for amounts actually expended by the mother.

In a *divorce* action, the parties and their children typically reside together and provide support for the child, either monetarily or through services, until the parties separate. Following the separation, a divorce action is filed and a temporary hearing occurs. At the temporary hearing, the trial court is authorized to award child support retroactive to the date of the parties' separation. *Shepherd v. Shepherd,* 231 Ga. 257, 260, 200 S.E.2d 893 (1973); *Hobbs v. Hobbs,* 158 Ga. 571, 574, 123 S.E. 891 (1924); *Killingsworth v. Killingsworth,* 148 Ga. 590(2), 97 S.E. 539 (1918). In other words, the trial court is vested with the authority to require a child born *within* wedlock to be supported by both parents retroactive to the date that one of the parents in fact ceases to support the child. The criteria for determining the amount include, *inter alia,* the other spouse's ability to pay. *See generally, McConaughey Ga. Divorce, Alimony and Child Custody,* (1993 Ed), § 8-5.

In the context of a paternity action, the parents are typically not residing together at the time the child is born. They will certainly have been separated for some time prior to the adjudication of paternity. In this case, the parties' child is now 18 years of age and the parties have never resided together.

The classification under current Georgia law which entitles legitimate children to greater child support than illegitimate children is not substantially related to any important governmental objective. Moreover, there is no rational basis for treating children born out of wedlock differently from those born in wedlock. Children in either situation are entitled to be supported consistent with the ability of the non-resident parent. In fact, in *Mabry v. Tadlock,* 157 Ga. App. 257, 277 S.E. 2d 688, 689 the court held "a father's duty to support his minor children is the same whether they are legitimate or illegitimate." This statement is consistent with the language of O.C.G.A. § 19-11-14, cited in *Weaver.* See page 8, supra.

To do otherwise, would be to violate the equal protection clauses of Amendment XIV, Section 1 of the Constitution of the United States of America and of Article I, Section I, Paragraph II of the Constitution of the State of Georgia. As stated by the United States Supreme Court in *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 175-176, 92 S.Ct. 1400, 1406-1407, 31 L.Ed. 2d 768 (1972)

> The status of illegitimacy has expressed through the age of society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate children is

> contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual – as well as an unjust – way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where – as in this case – the classification is justified by no legitimate state interest, compelling or otherwise.

The fact that the holding in *Weaver v. Chester* is not substantially related to any important governmental objective is demonstrated by analysis of the logic of that case.

Weaver holds that in determining back child support, the finder of fact should ignore the father's income and base an award of child support upon the amount that the mother actually spent. To illustrate how flawed this holding is, if we assume that the mother earns $500,000 per year and is willing to spend $10,000 per month on a child whose father earns $5,000 per year, then the father would be obligated to pay $5,000 per month in child support, (one-half of the amount actually spent on the child), which amount equals his gross income for the entire *year.*

If, on the other hand, we assume that the mother makes $5,000 per year and is only able to spend $200 per month on the child, then the father's obligation would be limited to paying $100 per month notwithstanding the fact that the father's income might be as high as $500,000 per year.

In the first illustration, the father is inappropriately penalized. In the second illustration, the child and the mother, who shoulders a disproportionate portion of the burden of supporting the child, are penalized. Each illustration runs contrary to the fundamental purpose of the court which is to insure that equity is done in each instance. The second illustration runs contrary to the principle of *parens patriae* and the court's obligation to insure the welfare of children who are unable to protect themselves.

Recognizing this failure of logic, the court in *Fowhand v. Piper,* 611 So. 2d 1308 (Fla. App. 1 Dist. 1992) rejected the argument that past child support in a paternity case should be limited solely to amounts actually expended by the mother on behalf of the child. The court stated "Such a rule would limit the parent who had not the means to provide adequately for her child to recover an amount that would obviously be less than a reasonable child support obligation, thus unfairly depriving the child." *Id.* at 1312. The court, noting that Florida law recognizes that support rights of illegitimate children are the same as those of legitimate children, affirmed the trial court's award of past child support based upon the child's needs and the ability of each parent to pay. See also *Mason v. Reiter,* 564 So. 2d 142, 144-145 (Fla. 3d DCA (1990).[2]

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[2] The Florida court in *Fowhand* criticized a sister court in Florida which allowed retroactive recovery of child support based upon the theory of reimbursing the mother for amounts actually expended. *Fowhand* at 1311-1312 citing *Valdez v. Lambert,* 568 So. 2d 117 (Fla. 5th DCA 1990) and *Williams v. Johnson,* 584 So. 2d 90, 91 (Fla. 5th DCA 1991). Previously, one other sister court in Florida allowed retroactive child support in a paternity

Recognizing that the rights and needs of illegitimate children are the same as those of legitimate children, numerous other states have awarded back child support in paternity actions based upon the child's needs and the father's ability to pay, rather than reimbursement for amounts actually expended by the mother. See *JoAnne P. v. Gary W.*, 441 A.2d 1161 (N.H. 1982); *Nettles v. Beckley*, 648 P.2d 508 (Wash. 1982); *People in Interest of L. W.*, 756 P. 2d 392 (Colo. 1988); *Gremillion ex rel. v. Erenberg*, 402 N.W. 2d 410 (Iowa 1987); *Watson v. Hampton*, 569 So. 2d 635 (La. 1990); *State ex rel. Coleman v. Clay*, 805 S.W. 2d 752 (Tenn. 1991); *Ellison v. Walter ex rel. Walter*, 834 P.2d 680 (Yo. 1992); *Miller v. Kershner*, 621 A.2d 1326 (Conn. 1993).

The *Weaver* decision did not undertake an equal protection analysis of whether illegitimate children are entitled to the same right to support as legitimate children. Instead, the Court of Appeals took a principle that made third parties liable for necessaries furnished to children and transmuted that into meaning the same thing as the amount of money actually spent by the mother on the child. Were the mother a quadriplegic incapable of furnishing any support for the child, the Court of Appeals' holding would leave the child with no support whatsoever since the Court of Appeals' holding makes the father only vicariously liable.

The law in Georgia requires parents to support their children and specifically extends the duty of support to fathers of illegitimate children. There is no basis, rational,

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action based upon the child's needs and the father's ability to pay. *Pensa v. Sklinar*, 547 So. 2d 284, 285 (Fla. 2d DCA 1989).

or otherwise, for penalizing an illegitimate child on the basis of its status by denying the child the same right to support afforded legitimate children generally. Therefore, retroactive child support in a paternity action should be awarded on the same basis as that upon which support is afforded to legitimate children: the child's needs and the father's ability to pay based upon statutory guidelines. Accordingly, the trial court's order denying Applicant the right to obtain documents from Respondent relevant to his ability to pay child support was error.

B. THE TRIAL COURT'S ORDER WAS AN ABUSE OF DISCRETION.

Defendant concedes that his income and financial condition for the period from his adjudication of paternity which was stipulated effective as of January 26, 1994 [Exhibit H] to the date the minor child attained the age of eighteen and graduated from high school, which was June 3, 1994, is pertinent and discoverable. Defendant objected to the production of documents that would reflect his income and assets during the period predating the adjudication of paternity as being irrelevant and not reasonably calculated to lead to the discovery of admissible evidence with respect to *prospective* child support. The trial court agreed with Defendant's position. The trial court's ruling was an abuse of discretion inasmuch as discovery of a defendant's income and assets preceding the adjudication of paternity is both relevant and reasonably calculated to lead to the discovery of admissible evidence since it can demonstrate that a defendant has hidden assets and it can further demonstrate that a defendant is artificially suppressing his income.

The child support guidelines are not carved in stone based upon the Respondent's present income or otherwise. They are merely a touchstone and a computational reference to be considered by the finder of fact. *Walker v. Walker,* 260 Ga. 442, 396 S.E.2d 235, 236 (1990):

Moreover,

> The trier of fact may vary the final award of child support, up or down, outside the range enumerated in paragraph 5 of subsection (b) of this Code Section upon a written finding of special circumstances. The special circumstances may be any factor which the trier of fact deems to be required by the ends of justice. *Some of the factors which may warrant such variation include, but are not limited to:* . . . (7) income that should be imputed to a party because of suppression of income. . . . O.C.G.A. § 19-6-15(c).

In determining an appropriate amount of child support, the issue is not simply what a father is presently making but what he is capable of making. *Mack v. Mack,* 234 Ga. 692, 217 S.E.2d 278, 279 (1975) [award of $160.00 per month child support not error where father was unemployed but capable of earning at least $500.00 per month]; *Hamner v. Hamner,* 223 Ga. 463, 156 S.E.2d 19, 20 (1967) [award of $25.00 per week child support and $50.00 per month alimony was not error where father was a college student earning $10.00 per week. "A husband is not excused from the support of his wife and children because he lacks an estate. If he has the capacity to labor, he should labor for their support; and if reluctant, he may be compelled by the court to do so."]; *Worrell v. Worrell,* 242 Ga. 44, 247 S.E.2d 847 (1978) [child support award of

up to $300.00 per month was not excessive where father had a temporary job earning $400.00 per month and had just received a master's degree and was capable of earning $15,000 per year.].

To once again illustrate the fallacy of the Respondent's argument, the Respondent could close his office, or reduce his work hours to one day per week, in order to artificially suppress his income long enough to obtain a favorable decision with respect to his child support obligation. As soon as the case was over, he could then resume full-time employment. The Applicant is entitled to ascertain Respondent's earning capacity by obtaining documents that predate the adjudication of paternity.

Similarly, Applicant is entitled to reasonable investigation as to the assets Respondent owns or has owned since the child's conception in order to determine whether or not those assets are still owned.

> The earning capacity of an asset of a party available for child support may be used in determining gross income. The reasonable earning potential of an asset may be determined by multiplying its equity by a reasonable rate of interest. The amount generated by that calculation should be added to the obligor's gross monthly income. O.C.G.A. § 19-6-15(b)(3).

Applicant has generally requested documents that go back five years. In the case of tax returns, deeds and financial statements, the Applicant has gone back further for the purpose of determining earning capacity and whether or not assets are still owned. By way of illustration, Schedule B of Respondent's individual income tax return would reflect dividend and interest income from

various sources. If those sources are not shown as having been disposed of subsequently by way of the realization of the capital gain or loss, then it would be a fair assumption that that asset is still owned.

The documents Applicant has requested are relevant to show the entire circumstances of Respondent's financial circumstances for purpose of fashioning an award of child support. Therefore, the trial court erred in denying Applicant's motion to compel production of those documents.

VII. CONCLUSION

The trial court's order prevents Applicant from gathering evidence which would be relevant to show Respondent's past and present financial circumstances in order to award retroactive and prospective child support based upon the father's ability to pay as indicated in the statutory guidelines. The trial court's order follows a classification in Georgia law, stated in the *Weaver* case, which invidiously discriminates against illegitimate children by denying them the same rights to support as are afforded to legitimate children. The holding of *Weaver* that restricts retroactive child support to an illegitimate child to amounts actually expended by the mother violates the equal protection clauses of the constitution of the State of Georgia and the United States Constitution. Moreover, the trial court's order is an abuse of discretion in denying Applicant the right to discover the financial circumstances of the Respondent prior to the adjudication of paternity as would be necessary in order to litigate the issue of both retroactive and prospective child support.

Therefore, the order of the trial court denying Applicant's motion to compel the production of documents should be reversed.

WEINSTOCK & SCAVO, P.C.

By: /s/ John P. Wilson, III
John P. Wilson, III
Georgia Bar No. 768675

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[Exhibits Omitted in Printing]

IN THE SUPREME COURT
STATE OF GEORGIA

BEVERLY JOAN CARLISLE, as Next Friend of ANGELA CARLISLE,	)	
Petitioner,	)	CIVIL ACTION FILE
v.	)	NO. ___
DR. JOHN MUNNA,	)	
Respondent.	)	

PETITION FOR WRIT OF CERTIORARI

COMES NOW Beverly Joan Carlisle, as next friend of Angela Carlisle, and hereby petitions this Court for certiorari. Petitioner shows that on June 10, 1994 she filed an Application for Discretionary Appeal with this Court. By order dated June 24, 1994 this Court transferred Petitioner's Application for Discretionary Appeal to the Court of Appeals for the State of Georgia. On July 6, 1994 the Court of Appeals for the State of Georgia denied Petitioner's Application for Discretionary Appeal. A true and correct copy of that Order is attached hereto and by reference incorporated herein as Exhibit "A." On July 15, 1994 Petitioner filed a Motion for Rehearing and Reconsideration in the Court of Appeals of the State of Georgia. By order dated July 28, 1994, the Court of Appeals of the State of Georgia denied Petitioner's Motion for Rehearing and Reconsideration. A true and correct copy of that order is attached hereto and by reference incorporated herein as Exhibit "B."

Certiorari is necessary and should be granted in this case because this is a case of great concern, gravity, and importance to the public.

I. STATEMENT OF JURISDICTION

Petitioner Beverly Joan Carlisle, as Next Friend of Angela Carlisle, hereby applies for a writ of certiorari from the denial of her discretionary appeal of an order by the trial court denying her Motion to Compel the Production of Documents. This Court has exclusive jurisdiction pursuant to the Constitution of the State of Georgia, Article VI, Section VI, Paragraph II as the application concerns the constitutionality of a law. The Court should grant the application because reversible error exists and will cause a substantial error at trial and the establishment of a precedent is desirable.

II. ORDER SOUGHT TO BE APPEALED

Attached to this petition and incorporated herein as Exhibit "C" is the Order of the trial court denying Plaintiff's Motion to Compel the Production of Documents. The Application was filed within ten (10) days of the entry by the trial court of a Certificate for Immediate Review, a copy of which is attached hereto and by reference incorporated herein as Exhibit "D."

III. EXHIBITS ATTACHED

A. Order of Court of Appeals for the State of Georgia Denying Application for Discretionary Appeal

B. Order of Court of Appeals for the State of Georgia Denying Motion for Rehearing and Reconsideration

C. Order Denying Motion to Compel the Production of Documents

D. Certificate of Immediate Review

E. Complaint for Determination of Paternity, Award of Child Support and other Relief

F. Plaintiff's Notice to Produce and Request for Production of Documents to Defendant

G. Defendant's Response to Plaintiff's Notice to Produce and Request for Production of Documents to Defendant

H. Plaintiff's Motion to Compel the Production of Documents and Brief in Support

I. Supplemental Brief in Support of Plaintiff's Motion to Compel the Production of Documents

J. Stipulation of Paternity

K. Notice of Intention to Apply for Certiorari

IV. ISSUES PRESENTED

A. WHETHER THE TRIAL COURT'S ORDER VIOLATES THE EQUAL PROTECTION CLAUSES OF THE CONSTITUTION OF THE STATE OF GEORGIA AND THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

B. WHETHER THE TRIAL COURT'S ORDER IS AN ABUSE OF DISCRETION.

V. STATEMENT OF FACTS

On or about October 27, 1993 Petitioner Beverly Joan Carlisle, as next friend of Angela Carlisle, filed an action against Respondent Dr. John Munna (Civil Action File No. E-21642, In the Superior Court of Fulton County, State of Georgia) for a determination of paternity, award of child support and other relief. Along with the complaint, Petitioner served discovery requests, including a request for production of documents to Defendant.

On December 29, 1993 Respondent served his response to Petitioner's Notice to Produce and Request for Production of Documents. In that response, Respondent objected generally to the scope and reach of the production. Further, Respondent made two specific objections concerning the scope of the request for production by claiming: (1) recovery for child support for the period prior to any adjudication of paternity would be limited to *amounts actually expended* by the mother for the support of the child, and therefore, with respect to back child support Petitioner's entitlement would be limited by evidence she would have within her control and would not be dependent on Respondent's financial circumstances, and (2) recovery for prospective support, i.e., support from the time of adjudication of paternity until such time as the child is no longer entitled to support, is based under Georgia law on the statutory guidelines and geared to current income and financial circumstances of the parties so that Petitioner should only be allowed to inquire

as to Respondent's financial circumstances from the period from and after an adjudication of paternity. Exhibit "E," pp. 1-2.

Petitioner's counsel sent a letter to Respondent's counsel pursuant to Uniform Superior Court Rule 6.4(B) on January 27, 1994, seeking to resolve Respondent's objections to document production. When the matter was not resolved, Petitioner filed motion to compel on or about March 30, 1994. After notice and hearing, the trial court denied the motion but granted a Certificate for Immediate Review.

In denying the Petitioner's motion to compel, the trial court relied on the Respondent's citation of *Weaver v. Chester,* 195 Ga. App. 471, 393 S.E.2d 715 (1990) which allowed the mother back child support only for necessaries actually furnished to the child of the parents who are not married. In so doing, the trial court rejected the arguments of Petitioner in her Supplemental Brief in Support of Plaintiff's Motion to Compel the Production of Documents that such a principle of law is illogical and in violation of the equal protection clauses of the Constitution of the United States of America and the Constitution of the State of Georgia.

VI. - ARGUMENT AND CITATION OF AUTHORITY

A. THE TRIAL COURT'S ORDER VIOLATES THE EQUAL PROTECTION CLAUSES OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND THE CONSTITUTION OF THE STATE OF GEORGIA.

Georgia law presently provides that retroactive or back child support for an *illegitimate* child is recoverable

only upon the basis of amounts actually spent by the mother whereas retroactive or back child support, in the case of *legitimate* children, is recoverable based upon amounts actually expended and, *in addition,* the income, assets and ability to pay of the father. The issue of whether the law in the State of Georgia limiting a retroactive award of child support in a paternity action to amounts actually expended by the mother violates the equal protection clauses of the Constitution of the State of Georgia and the Constitution of the United States of America is an issue of first impression in this state. For the reasons shown below, the law as expressed in *Weaver v. Chester,* supra, is unconstitutional; therefore, the trial court's order denying production of documents relevant to the father's financial circumstances prior to his adjudication of paternity is erroneous and must be reversed.

The Equal Protection Clause of Amendment XIV of the Constitution of the United States provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Equal Protection Clause of Article I, Section I, Paragraph 2 of the Constitution of the State of Georgia provides: "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."

In *Clark v. Jeter,* 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed. 2d 465 (1988) the United States Supreme Court followed the standard established by *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 175, 92 S.Ct. 1400, 1406, 31 L.Ed. 2d 768 (1972) that classifications which distinguish

between legitimate and illegitimate children must withstand intermediate scrutiny by being substantially related to an important governmental objection. Applying that standard, the U.S. Supreme Court struck down a six-year statute of limitations for paternity actions under Pennsylvania law.

The *Clark v. Jeter* decision followed a series of rulings in which the United States Supreme Court applied the equal protection clause of the Fourteenth Amendment to the Constitution of the United States to strike down statutes which invidiously discriminated against illegitimate children. In *Gomez v. Perez*, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed. 2d [sic] (1973) the U.S. Supreme Court followed previous cases by holding that

> Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded to children generally. We therefore hold that *once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.* For a State to do so is 'illogical and unjust.' (Emphasis added).

Id at 93 S.Ct. 872, 875, citing *Weber v. Etna* [sic] *Casualty & Surety Co.*, 406 U.S. 164, 175, 92 S.Ct. 1400, 1406, 31 L.E.2d 768 (1972). As a result, the U.S. Supreme Court in *Gomez* struck down the order of the Texas State trial judge denying support to an illegitimate child. During oral argument the attorney for the State of Texas conceded that but for the fact that the child was illegitimate she would be entitled to support under the laws of Texas.

In *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed. 2d 31 (1977) the United States Supreme Court held that a provision of the Illinois Probate Act which allowed children born out of wedlock to inherit by intestate succession only from their mothers, whereas children born in wedlock may inherit by intestate succession from both their mothers and their fathers, denied equal protection. In so doing, the court found that the classification did not even bear some rational relationship to any legitimate state purpose.

In *Mills v. Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed. 2d 770 (1982) the U.S. Supreme Court, following *Gomez*, struck down a one-year limitation period for filing paternity actions in Texas. In so doing, the court agreed with the appellant that the statute imposed a burden on illegitimate children not shared by legitimate children which was not substantially related to a legitimate state interest.[1]

Also, in *Pickett v. Brown*, 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed. 2d 372 (1983) the U.S. Supreme Court held that a

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[1] The Court held that the fact that Texas must provide illegitimate children with a bona fide opportunity to obtain paternal support does not mean that it must adopt procedures for illegitimate children that are coterminous with those accorded legitimate children. The court explained, though, that paternal support suits on behalf of illegitimate children contain an element that suits for legitimate children do not contain: proof of paternity. The court's focus on the issue at hand then found that the interest of the state in preventing the prosecution of stale or fraudulent claims in order to ensure proof of paternity still did not justify the additional burden on illegitimate children of the one-year statute of limitations.

Tennessee statute imposing a two-year limitations on paternity and child support actions on behalf of certain illegitimate children denies those children equal protection. The court cited numerous cases since 1968 in which, in several instances, classifications based on illegitimacy were held invalid. *Pickett v. Brown*, 103 S.Ct. at 2203.

The "equal protection" provisions of the Georgia Constitution, though employing different phraseology than the Fourteenth Amendment, "are substantially equivalent of equal protection of the laws under the U.S. Constitution." *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981); *State of Georgia v. Sanks*, 225 Ga. 88, 166 S.E.2d 19 (1969). The Equal Protection Clause is aimed at all official actions, not just those of state legislatures. *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed. 2d 666, *rehearing denied* 444, U.S. 887, 100 S.Ct. 186, 62 L.Ed. 2d 121, *on remand* 519 F.Supp. 925, *affirmed*, 663 F.2d 24 (1979). *See also McDaniel v. Thomas, supra*, (equal protection attack on existing system of financing public education); *Ponder v. Fulton-DeKalb Hospital Authority*, 256 Ga. 883, 353 S.E.2d 515 (1987) (equal protection attack on case law regarding Georgia's charitable immunity doctrine). The state constitutional right to equal protection extends equally to children as well as to adults. *In the interest of S.H.*, 204 Ga. App. 135, 418 S.E.2d 454 (1992). In the present case state action is present by virtue of the interpretation by the Court of Appeals of the State of Georgia of the principle of law in *Weaver* and also because such interpretation flows from the state action embodied in the state's child support and paternity statutes. O.C.G.A. §§ 19-7-24, 19-7-51, and 19-11-14.

Any classification under Georgia law which invidiously discriminates against illegitimate children is not only a constitutional violation, but also contrary to existing Georgia law. In *Poulos v. McMahan*, 250 Ga. 354, 297 S.E.2d 451 (1982) this Court, following the numerous line of United States Supreme Court decisions striking down discrimination against illegitimate children, held that Georgia's pre-1980 statutory intestacy scheme was unconstitutional because it excluded significant categories of illegitimate children whose inheritance rights could have been recognized without jeopardizing orderly administration of estates. Also, in *Edenfield v. Jackson*, 251 Ga. 491, 306 S.E. 2d 911 (1983) this Court avoided finding the Georgia statute authorizing a cause of action for wrongful death for the widow of the deceased or, if there is no widow, the children of the deceased, by holding that the statute must be interpreted as including both legitimate and illegitimate children (and in the process overruling prior case law which interpreted the statute as excluding illegitimate children from the statute). *See also, Tolbert v. Murrell*, 253 Ga. 566, 322 S.E.2d 487 (1984) (Georgia's wrongful death statute unconstitutionally discriminated on the basis of decedent's sex; children have the right to sue for the wrongful death of their father as well as for their mother).

In *Mabry v. Tadlock*, 157 Ga. App. 257, 277 S.E. 2d 688, 689 the court held *"a father's duty to support his minor children is the same whether they are legitimate or illegitimate."* This statement is consistent with the language of O.C.G.A. § 19-11-14, cited in Weaver, which states in pertinent part: *"Whenever a man has been adjudicated by a court of competent jurisdiction as the father of a child born out*

of wedlock or whenever he has acknowledged paternity . . . he shall be legally liable for the support of the child in the same manner as he would owe the duty of support if the child were his child born in wedlock." (Emphasis added).

Thus like the United States Supreme Court, this Court has struck down classifications which invidiously discriminated against illegitimate children. In *Poulos v. McMahan,* 250 Ga. 354, 297 S.E.2d 451 (1982) this Court, following the numerous line of United States Supreme Court decisions striking down discrimination against illegitimate children, held that Georgia's pre-1980 statutory intestacy scheme was unconstitutional because it excluded significant categories of illegitimate children whose inheritance rights could have been recognized without jeopardizing orderly administration of estates. Also, in *Edenfield v. Jackson,* 251 Ga. 491, 306 S.E. 2d 911 (1983) this Court avoided finding the Georgia statute authorizing a cause of action for wrongful death for the widow of the deceased or, if there is no widow, the children of the deceased, by holding that the statute must be interpreted as including both legitimate and illegitimate children (and in the process overruling prior case law which interpreted the statute as excluding illegitimate children from the statute). *See also, Tolbert v. Murrell,* 253 Ga. 566, 322 S.E.2d 487 (1984) (Georgia's wrongful death statute unconstitutionally discriminated on the basis of decedent's sex; children have the right to sue for the wrongful death of their father as well as for their mother).

The ruling in *Weaver v. Chester* invidiously discriminates against illegitimate children and is not substantially related to any important governmental objective. In

Weaver the court relied on O.C.G.A. § 19-11-14 to find that in a paternity action a father is obligated to pay back support to the mother for those periods prior to the adjudication of paternity. In so holding the court cited the language of O.C.G.A. § 19-11-14 supra at page 9, which obligates fathers of children born out of wedlock to provide support in the same manner as if the child was born in wedlock.

However, the court in *Weaver* rejected the mother's contention that the amount of back support to which she is entitled is to be measured by the father's ability to pay during the periods in question rather than by the expenses actually incurred by her on the child's behalf. In so doing, the court cited O.C.G.A. § 19-6-13 which provides that "[u]ntil otherwise provided voluntarily or by decree or order of a court, [parents] are liable to third persons for the board and support and for all necessaries furnished to or for [their] children." *Id.* at 718. The court then cited *Smith v. Smith*, 136 Ga. 531, 71 S.E. 869 (1911) and *Brown v. Brown*, 132 Ga. 712, 64 S.Ed. 1092 (1909) as holding that O.C.G.A. § 19-6-13 applies only to parents of illegitimate children. Thus, the court found that although children of legitimate parents are entitled to back child support based upon the needs of the child and the parent's ability to pay, illegitimate children are only entitled to back child support for amounts actually expended by the mother.

In a *divorce* action, the parties, and their children typically reside together and provide support for the child, either monetarily or through services, until the parties separate. Following the separation, a divorce action is filed and a temporary hearing occurs. At the

temporary hearing, the trial court is authorized to award child support retroactive to the date of the parties' separation. *Shepherd v. Shepherd,* 231 Ga. 257, 260, 200 S.E.2d 893 (1973); *Hobbs v. Hobbs,* 158 Ga. 571, 574, 123 S.E. 891 (1924); *Killingsworth v. Killingsworth,* 148 Ga. 590(2), 97 S.E. 539 (1918). In other words, the trial court is vested with the authority to require a child born *within* wedlock to be supported by both parents retroactive to the date that one of the parents in fact ceases to support the child. The criteria for determining the amount include, *inter alia,* the other spouse's ability to pay. *See generally, McConaughey Ga. Divorce, Alimony and Child Custody,* (1993 Ed), § 8-5.

In the context of a paternity action, the parents are typically not residing together at the time the child is born. They will certainly have been separated for some time prior to the adjudication of paternity. In this case, the parties' child is now 18 years of age and the parties have never resided together.

The classification under current Georgia law which entitles legitimate children to greater child support than illegitimate children is not substantially related to any important governmental objective. Moreover, there is no rational basis for treating children born out of wedlock differently from those born in wedlock. Children in either situation are entitled to be supported consistent with the ability of the non-resident parent. In fact, in *Mabry v. Tadlock,* 157 Ga. App. 257, 277 S.E. 2d 688, 689 the court held "a father's duty to support his minor children is the same whether they are legitimate or illegitimate." This statement is consistent with the language of O.C.G.A. § 19-11-14, cited in *Weaver,* See page 8, supra.

To do otherwise, would be to violate the equal protection clauses of Amendment XIV, Section 1 of the Constitution of the United States of America and of Article I, Section I, Paragraph II of the Constitution of the State of Georgia. As stated by the United States Supreme Court in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-176, 92 S.Ct. 1400, 1406-1407, 31 L.Ed. 2d 768 (1972)

> The status of illegitimacy has expressed through the age of society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate children is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual – as well as an unjust – way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where -as in this case - the classification is justified by no legitimate state interest, compelling or otherwise.

The fact that the holding in *Weaver v. Chester* is not substantially related to any important governmental objective is demonstrated by analysis of the logic of that case.

Weaver holds that in determining back child support, the finder of fact should ignore the father's income and base an award of child support upon the amount that the

mother actually spent. To illustrate how flawed this holding is, if we assume that the mother earns $500,000 per year and is willing to spend $10,000 per month on a child whose father earns $5,000 per year, then the father would be obligated to pay $5,000 per month in child support, (one-half of the amount actually spent on the child), which amount equals his gross income for the entire *year.*

If, on the other hand, we assume that the mother makes $5,000 per year and is only able to spend $200 per month on the child, then the father's obligation would be limited to paying $100 per month notwithstanding the fact that the father's income might be as high as $500,000 per year.

In the first illustration, the father is inappropriately penalized. In the second illustration, the child and the mother, who shoulders a disproportionate portion of the burden of supporting the child, are penalized. Each illustration runs contrary to the fundamental purpose of the court which is to insure that equity is done in each instance. The second illustration runs contrary to the principle of parens patriae and the court's obligation to insure the welfare of children who are unable to protect themselves.

Recognizing this failure of logic, the court in *Fowhand v. Piper,* 611 So. 2d 1308 (Fla. App. 1 Dist. 1992) rejected the argument that past child support in a paternity case should be limited solely to amounts actually expended by the mother on behalf of the child. The court stated "Such a rule would limit the parent who had not the means to provide adequately for her child to recover an amount that would obviously be less than a reasonable child

support obligation, thus unfairly depriving the child." *Id.* at 1312. The court, noting that Florida law recognizes that support rights of illegitimate children are the same as those of legitimate children, affirmed the trial court's award of past child support based upon the child's needs and the ability of each parent to pay. See also *Mason v. Reiter,* 564 So. 2d 142, 144-145 (Fla. 3d DCA 1990).[2]

Recognizing that the rights and needs of illegitimate children are the same as those of legitimate children, numerous other states have awarded back child support in paternity actions based upon the child's needs and the father's ability to pay, rather than reimbursement for amounts actually expended by the mother. See *JoAnne P. v. Gary W.,* 441 A.2d 1161 (N.H. 1982); *Nettles v. Beckley,* 648 P.2d 508 (Wash. 1982); *People in Interest of L. W.,* 756 P.2d 392 (Colo. 1988); *Gremillion ex rel. v. Erenberg,* 402 N.W.2d 410 (Iowa 1987); *Watson v. Hampton,* 569 So. 2d 635 (La. 1990); *State ex rel. Coleman v. Clay,* 805 S.W. 2d 752 (Tenn. 1991); *Ellison v. Walter ex rel. Walter,* 834 P.2d 680 (Yo. 1992); *Miller v. Kershner,* 621 A.2d 1326 (Conn. 1993).

The *Weaver* decision did not undertake an equal protection analysis of whether illegitimate children are entitled to the same right to support as legitimate children.

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[2] The Florida court in *Fowhand* criticized a sister court in Florida which allowed retroactive recovery of child support based upon the theory of reimbursing the mother for amounts actually expended. *Fowhand* at 1311-1312 citing *Valdez v. Lambert,* 568 So. 2d 117 (Fla. 5th DCA 1990) and (*Williams v. Johnson,* 584 So. 2d 90, 91 (Fla. 5th DCA 1991). Previously, one other sister court in Florida allowed retroactive child support in a paternity action based upon the child's needs and the father's ability to pay. *Pensa v. Sklinar,* 547 So. 2d 284, 285 (Fla. 2d DCA 1989).

Instead, the Court of Appeals took a principle that made third parties liable for necessaries furnished to children and transmuted that into meaning the same thing as the amount of money actually spent by the mother on the child. Were the mother a quadriplegic incapable of furnishing any support for the child, the Court of Appeals' holding would leave the child with no support whatsoever since the Court of Appeals' holding makes the father only vicariously liable.

The law in Georgia requires parents to support their children and specifically extends the duty of support to fathers of illegitimate children. Georgia law also provides that the obligation is the same whether the child is born in or out of wedlock. There is no basis, rational, or otherwise, for penalizing an illegitimate child on the basis of its status by denying the child the same right to support afforded legitimate children generally. Therefore, retroactive child support in a paternity action should be awarded on the same basis as that upon which support is afforded to legitimate children: the child's needs and the father's ability to pay based upon statutory guidelines. Accordingly, the trial court's order denying Petitioner the right to obtain documents from Respondent relevant to his ability to pay child support was error.

B. THE TRIAL COURT'S ORDER WAS AN ABUSE OF DISCRETION

Defendant concedes that his income and financial condition for the period from his adjudication of paternity which was stipulated effective as of January 26, 1994 [Exhibit H] to the date the minor child attained the age of

eighteen and graduated from high school, which was June 3, 1994, is pertinent and discoverable. Defendant objected to the production of documents that would reflect his income and assets during the period predating the adjudication of paternity as being irrelevant and not reasonably calculated to lead to the discovery of admissible evidence with respect to *prospective* child support. The trial court agreed with Defendant's position. The trial court's ruling was an abuse of discretion inasmuch as discovery of a defendant's income and assets preceding the adjudication of paternity is both relevant and reasonably calculated to lead to the discovery of admissible evidence since it can demonstrate that a defendant has hidden assets and it can further demonstrate that a defendant is artificially suppressing his income.

The child support guidelines are not carved in stone based upon the Respondent's present income or otherwise. They are merely a touchstone and a computational reference to be considered by the finder of fact. *Walker v. Walker,* 260 Ga. 442, 396 S.E.2d 235, 236 (1990):

Moreover,

> The trier of fact may vary the final award of child support, up or down, outside the range enumerated in paragraph 5 of subsection (b) of this Code Section upon a written finding of special circumstances. The special circumstances may be any factor which the trier of fact deems to be required by the ends of justice. *Some of the factors which may warrant such variation include, but are not limited to:* . . . (7) income that should be imputed to a party because of suppression of income. . . . O.C.G.A. § 19-6-15(c).

In determining an appropriate amount of child support, the issue is not simply what a father is presently making but what he is capable of making. *Mack v. Mack,* 234 Ga. 692, 217 S.E.2d 278, 279 (1975) [award of $160.00 per month child support not error where father was unemployed but capable of earning at lest [sic] $500.00 per month]; *Hammer v. Hammer,* 223 Ga. 463, 156 S.E.2d 19, 20 (1967) [award of $25.00 per week child support and $50.00 per month alimony was not error where father was a college student earning $10.00 per week. "A husband is not excused from the support of his wife and children because he lacks an estate. If he has the capacity to labor, he should labor for their support; and if reluctant, he may be compelled by the court to do so."]; *Worrell v. Worrell,* 242 Ga. 44, 247 S.E.2d 847 (1978) [child support award of up to $300.00 per month was not excessive where father had a temporary job earning $400.00 per month and had just received a master's degree and was capable of earning $15,000 per year.].

To once again illustrate the fallacy of the Respondent's argument, the Respondent could close his office, or reduce his work hours to one day per week, in order to artificially suppress his income long enough to obtain a favorable decision with respect to his child support obligation. As soon as the case was over, he could then resume full-time employment. The Petitioner is entitled to ascertain Respondent's earning capacity by obtaining documents that predate the adjudication of paternity.

Similarly, Petitioner is entitled to reasonable investigation as to the assets Respondent owns or has owned since the child's conception in order to determine whether or not those assets are still owned.

> The earning capacity of an asset of a party available for child support may be used in determining gross income. The reasonable earning potential of an asset may be determined by multiplying its equity by a reasonable rate of interest. The amount generated by that calculation should be added to the obligor's gross monthly income. O.C.G.A. § 19-6-15(b)(3).

Petitioner has generally requested documents that go back five years. In the case of tax returns, deeds and financial statements, the Petitioner has gone back further for the purpose of determining earning capacity and whether or not assets are still owned. By way of illustration, Schedule B of Respondent's individual income tax return would reflect dividend and interest income from various sources. If those sources are not shown as having been disposed of subsequently by way of the realization of the capital gain or loss, then it would be a fair assumption that that asset is still owned.

The documents Petitioner has requested are relevant to show the entire circumstances of Respondent's financial circumstances for purpose of fashioning an award of child support. Therefore, the trial court erred in denying Petitioner's motion to compel production of those documents.

C. THE PRESENT ERRORS OF LAW SHOULD BE CORRECTED AT THIS TIME TO AVOID WASTED EXPENSE AND TIME IN THE FUTURE.

Petitioner realizes that this Petition and her initial Application for Discretionary Appeal are made in the context of a denial of a discovery order rather than after a

judgment. However, determination of the appeal at this time is necessary because the issue to be decided will be dispositive of a major portion of this case, the order appears erroneous and will probably cause a substantial error at trial, and the establishment of a precedent is desirable. Rule 22, Rules of the Supreme Court of the State of Georgia. Specifically, if the appropriate standard for child support is not applied at this time the trial of this case will be fruitless and a waste of judicial economy, causing the parties unnecessary expense. The evidence sought from Petitioner's discovery would support Petitioner's claim for child support based upon her needs *and* the father's ability to pay. Without such evidence, Petitioner cannot pursue her claim based upon what she believes to be the appropriate standard. There is no point in going forth with the trial of this case based on a standard for back child support which violates equal protection of the laws.

VII. CONCLUSION

The trial court's order prevents Applicant from gathering evidence which would be relevant to show Respondent's past and present financial circumstances in order to award retroactive and prospective child support based upon the father's ability to pay as indicated in the statutory guidelines. The trial court's order follows a classification in Georgia law, stated in the *Weaver* case, which invidiously discriminates against illegitimate children by denying them the same rights to support as are afforded to legitimate children. The standard for back child support for children born out of wedlock announced in

Weaver v. Chester, supra, clearly violates the equal protection clauses of the Constitution of the United States of America, Amendment XIV, Section 1 and the Constitution of the State of Georgia, Article I, Section 1, Paragraph 2. Further, the holding of *Weaver* is directly contrary to O.C.G.A. § 9-11-14 which obligates fathers to support children born out of wedlock in the same manner as their obligation to support children born in wedlock. Moreover, the trial court's order is an abuse of discretion in denying Applicant the right to discover the financial circumstances of the Respondent prior to the adjudication of paternity as would be necessary in order to litigate the issue of both retroactive and prospective child support. Therefore, the order of the trial court denying Petitioner's motion for the production of documents should be reversed, and this Court should grant certiorari for same.

This is a case of first impression in this State.

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No. 94-1271

In The

Supreme Court of the United States

October Term, 1994

BEVERLY JOAN CARLISLE, AS NEXT FRIEND OF ANGELA CARLISLE,

Petitioner,

v.

DR. JOHN MUNNA,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Georgia's denial of Petitioner's interlocutory appeal from the trial court's refusal to compel discovery constitutes a final judgment within the meaning of 28 U.S.C. § 1257?

2. Whether the Supreme Court of Georgia's denial under the abuse of discretion standard of Petitioner's interlocutory appeal from the trial court's refusal to compel discovery constitutes an independent and adequate state ground barring review by this Court?

3. Whether Georgia law which authorizes the award of retroactive child support payments following a determination of paternity creates a classification based on illegitimacy and, if so, whether that classification is constitutionally impermissible?

4. Whether the foregoing constitutional question is ripe for review by this Court given the undeveloped factual record in this case and the many factual contingencies that could render review by this Court unnecessary?

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Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION

JURISDICTION

This Court does not have jurisdiction under 28 U.S.C. § 1257 because the order of the Supreme Court of Georgia dated November 3, 1994 does not meet the "final judgment" requirement. Nor does that order draw into question the constitutional validity of any Georgia statute or rule of law.

STATEMENT OF THE CASE

Petitioner's statement of facts is incomplete.

Petitioner Beverly Carlisle gave birth to Angela Carlisle during a marriage which ended in divorce two years ago. Under Georgia law, Angela was and is presumed to be legitimate. Petitioner's former husband believed himself to be Angela's biological father and he supported Angela fully until the divorce. As Respondent understands the facts, this support included all of the out-of-pocket expenses for Angela's upbringing.[1] Petitioner provided care, guidance, emotional support and other parental nurturing. But she did not work outside the home. Petitioner's former husband apparently learned for the first time that Angela was not his daughter during the divorce proceedings. Angela was sixteen years old at the time. Angela is now 18 years old, the age of majority in Georgia. Under Georgia law, the obligation to provide child support ceases at this age.

After her divorce, Petitioner brought a paternity action against Respondent Dr. John Munna, claiming that he, not her former husband, was Angela's biological father. Until the filing of that action, Dr. Munna had no idea that he might be Angela's father. Acting in a thoroughly honorable manner, however, Dr. Munna submitted to a blood test. The test results indicated that Dr. Munna is Angela's father.

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[1] This appeal arises from a discovery dispute so all pertinent facts relating to the child support issue below have not been fully developed.

Respondent recognizes the legal possibility that he may have to assume some child support obligations under Georgia law. But, at this juncture, there has been no formal adjudication of paternity. A fortiori, the child support question has not and could not have been addressed substantively below. Indeed, several unanswered state law questions remain to be decided, each of which could be dispositive of this case against the Petitioner without ever reaching her tenuous constitutional claim.

When the interlocutory appeal was filed below, this case was in the very early stage of litigation. Discovery in fact was still ongoing. Beverly Carlisle filed a motion to compel discovery. That motion was denied. The application for interlocutory appeal was thereafter taken.

Petitioner's application was first filed in the Supreme Court of Georgia, apparently on the theory that the denial of the motion to compel presented a constitutional question in the procedural context of this case. Because no constitutional question in fact had been raised and because under Georgia law no mandatory jurisdiction attached,[2] the Supreme Court transferred the matter to the Georgia Court of Appeals.

The Court of Appeals summarily denied Petitioner's application for discretionary review. Thereafter, Petitioner applied for certiorari to the Supreme Court of

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[2] Under Georgia law, a challenge to the constitutionality of a state statute must be appealed to the Supreme Court of Georgia not the Court of Appeals. Constitution of the State of Georgia, Art. VI, § 6, ¶ 2.

Georgia. That petition was similarly denied. Petitioner now asks this Court to render an advisory opinion on a constitutional question which (a) has never been addressed below, (b) was not ripe, in any event, for consideration in the context of Petitioner's motion to compel and (c) may never have to be addressed to resolve this lawsuit.

REASONS FOR DENYING WRIT

1. As indicated above, the order appealed from below was the denial of Petitioner's motion to compel discovery. Under Georgia law, such trial level orders are not considered "final" and the appeal from such an order is discretionary. O.C.G.A. §§ 5-6-34 and -35. Appeal is not available as a matter of right. Moreover, the denial of a motion to compel discovery is resolved in Georgia under the abuse of discretion standard. *See Freeman v. Ripley*, 339 S.E.2d 795 (Ga. App. 1986); *Nixon v. Sandy Springs Fitness Ctr., Inc.*, 306 S.E.2d 362 (Ga. App. 1983).

As stated above, there has been no ruling below – final or otherwise – on either paternity or the extent of Petitioner's right to recover child support. The legal standard which Petitioner attacks as a penalty directed against illegitimate offspring has never been applied to her and may never be. As to that potential question, the Georgia Supreme Court's order denying certiorari can not be considered a final judgment within the meaning of 28 U.S.C. § 1257. Frankly, Respondent's research does not reveal a single decision by this Court which would even remotely lend color to Petitioner's assumption that this

case meets the final judgment requirement. All substantive decisions under state law lie ahead. After all is said and done below, there will be ample opportunity for this Court to say whether a constitutional question is presented for review.[3]

2. To grasp the many state law contingencies which will directly affect Petitioner's ability to raise the constitutional claim she would like this petition to present, the Court should consider the following:

a. The Georgia courts may, and in fact should, reject the claim for full retroactive recovery of child support by a mother under circumstances such as those apparently presented below.

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[3] Every final judgment opinion that Respondent has reviewed involved a lower court order that at least addressed the underlying constitutional question or could have addressed the question. Neither possibility existed in the instant case since the child support issue remains far down the road if it is ever to be reached at all. None of the exceptions to finality under § 1257 recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-85 (1975), applies here. Inasmuch as further proceedings of substance remain to be decided, the present case generally fits the pattern exhibited in *Flynt v. Ohio*, 451 U.S. 619 (1981) (despite unsuccessful pre-trial challenge to obscenity prosecution on selective prosecution grounds, case not final under § 1257 until both criminal conviction and imposition of sentence have occurred) and *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981) (no final judgment where state court determined monetary remedy not available for property takings, but left open the possibility of alternative remedies on remand). Of note in the present case is the fact that the record below is far, far less developed than in *Flynt* and *San Diego*.

A newly-created cause of action for retroactive recovery of child support expenses on behalf of a non-marital child was first recognized in Georgia in 1990. *Weaver v. Chester,* 393 S.E.2d 715 (Ga. App. 1990). In *Weaver,* the State Department of Human Resources sued Chester, alleging paternity of a non-marital child on whose behalf the department had paid public assistance benefits.

The child's mother was added to the state's suit as a plaintiff seeking reimbursement for actual expenditures she made on behalf of the child for periods of time during which the child was not receiving public assistance benefits. During those periods she was the child's sole provider and, in light of the obligation of both parents to support a child, the mother's theory was that she was entitled to reimbursement for the father's share of the expenses. Based on prior law, the trial court found "no legal basis" for such a claim. Drawing upon an analogy to the criminal law of child abandonment, the Georgia Court of Appeals, held:

> If a father can be imprisoned for having failed to support his child during the period before a judicial determination of paternity was made, there would appear to be no bar to the entry of a civil judgment against him to enforce the same support obligation.

Id. at 717.

In further support of the common-law creation of this cause of action, the court cited a provision of the Uniform Reciprocal Enforcement of Support Act authorizing an out-of-state custodian to seek reimbursement for actual child support expenditures and a North Carolina

Supreme Court case holding that a father's duty to support "arises when the child is born." *Tidwell v. Booker*, 225 S.E.2d 816 (N.C. 1976). The court also cited appellate cases in several other jurisdictions.

While Petitioner, in essence, seeks to have this Court address the constitutionality of the *Weaver* rule, several points are crucial to a complete understanding of the possible applicability of *Weaver* to the current case. First, and most important, its facts differ significantly from those which likely will emerge in the instant case. The child in *Weaver* had been supported, prior to the litigation, by his unmarried mother, sometimes with help from public assistance payments by the state. In the instant case, the child was supported through most of her minority by the Petitioner and her former husband, who treated the child as his own until the divorce. The facts which have been developed to this point suggest that all or virtually all out-of-pocket financial support was provided primarily by the Petitioner's former husband.

Thus, it is not at all apparent that the *Weaver* rule is applicable to the facts of the current case. It is possible that the Georgia Supreme Court, when it gets its first opportunity to deal with *Weaver*'s newly-recognized cause of action, will reject judicial creation of such a remedy. Despite the considerations which underlie it, the *Weaver* rule would require in some cases the determination of expenditures incurred many years ago. Given the problems of proof that the *Weaver* rule might engender, it is possible that the Georgia Supreme Court will confine such child support claims to prospective relief alone.

b. Alternatively, the Georgia Supreme Court might accept the *Weaver* rule, but limit its coverage to situations where the custodial parent has supported the child alone and seeks reimbursement for those expenditures from the non-custodial parent. None of the courts which have recently recognized the claim for reimbursement of child support have dealt with a case in which the child had lived with a step-parent and had received support throughout his minority from a biologically unrelated person. *See, e.g., Ellison v. Walter,* 834 P.2d 680 (Wyo. 1992); *State ex rel. Coleman v. Clay,* 805 S.W.2d 752 (Tenn. 1991); *Kathy L.B. v. Patrick J.B.,* 371 S.E.2d 583 (W.Va. 1988); *W.M. v. D.S.C.,* 591 A.2d 837 (D.C. App. 1991); *Mason v. Reiter,* 564 So.2d 142 (Fla. App. 1990); *Napowsa v. Langston,* 381 S.E.2d 882 (N.C. App. 1989); *Dep't of Rev. v. Roe,* 560 N.E.2d 1288 (Mass. App. 1990); *Coleman v. Mackey,* 424 So.2d 170 (Fla. App. 1983); *Baugh v. Carver,* 444 N.E.2d 58 (Ohio App. 1981).

While accepting plaintiff's claim that courts should generally order reimbursement for child support expenses once defendant's paternity has been determined, the Ohio appellate court in *Baugh v. Carver, supra,* went on to limit such recovery where there was:

> [A]n affirmative demonstration of some circumstance which ought reasonably to relieve the father of this obligation and the child of this entitlement.

444 N.E.2d at 61. If the instant litigation is permitted to proceed without intervention by this Court early in the litigation process, the Georgia courts may indeed determine that the facts of this case constitute such "an affirmative demonstration." The child was raised until the

age of sixteen by her mother and by a man the child believed to be her "father." The support was consistent with the latter's earning power. Retroactive child support at this point is unnecessary and, to the extent that Petitioner's former husband was the family breadwinner, any reimbursement to the Petitioner unrelated to her own *actual* expenditures would provide a windfall. The Georgia courts may well decide that the Petitioner in this case is entitled to no reimbursement at all.

c. Even if *Weaver* is accepted as generally applicable to a case like the present one, a number of state law issues remain uncertain and, depending upon their resolution, they could significantly alter the posture of the case and ultimately would make the present constitutional challenge to the basic rule of *Weaver* moot or a mere advisory opinion. For example, it is possible that the courts might find that any action in this case was barred or limited by the statute of limitations. In *Napowsa v. Langston, supra*, the court held that this kind of action was, in fact, an action by a creditor against a debtor and, thus, limited by the three-year statute of limitations. A finding that a statute of limitations was applicable here might lead the Petitioner to abandon the suit altogether or might serve as a complete defense for the Respondent.

d. Similarly, the equitable doctrine of laches has been held applicable in child support reimbursement cases by the West Virginia Supreme Court in *Kathy L.B. v. Patrick J.B., supra*. This rule, if recognized on the facts presented here, would encourage the early judicial resolution of disputed paternity claims which can be quite fact-intensive and difficult. The instant case would seem

to be a particularly appropriate case to apply such a doctrine in light of the Petitioner's sixteen year delay in bringing the action.

e. A final question left open at this point in the nascent Georgia jurisprudence on this subject is the role of the former husband in this litigation. It would seem if reimbursement is granted for child support expenditures, the reimbursement should go to the former husband to the extent he supported a child which was not his. That, in turn, would require a determination of how much of the actual expenditures were chargeable to the mother (who was obligated to support her child) and how much were chargeable to her former husband (who was not obligated). How to conduct this inquiry, particularly in a non-community property state which applies equitable distribution on divorce, is a question which does not yield a self-evident answer. The Georgia Supreme Court's answer to this question will undoubtedly affect the posture of this case.

3. The foregoing contingencies would not only have an effect on whether the illegitimacy question is ever reached in this case; they would also provide independent and adequate state law grounds for decision. *See Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566-68 (1977). Assuming that the finality requirement of § 1257 is otherwise satisfied, the independent and adequate state ground doctrine would operate as a bar to Supreme Court review.

4. Finally, the underlying premise of the instant petition for a writ of certiorari is that the *Weaver* rule

unconstitutionally discriminates against illegitimate children. This premise is erroneous. Under Georgia law, all children – whether legitimate or illegitimate – have the same right to child support following a determination of paternity. Georgia law, however, applies a different standard for fixing child support obligations prospectively than it does retrospectively. If the support order goes back in time, the father must reimburse the mother for his share of out-of-pocket expenditures. For the future, the amount of child support is determined based on the need of the child and the father's current earning capacity. Under the *Weaver* rule, this distinction is based on the timing of the determination of paternity, not the child's status as legitimate or illegitimate. The distinction is also based upon the obvious difficulty of proving past ability to pay child support (which may no longer reflect present reality) as opposed to past out-of-pocket expenditures on behalf of a child (which represent hard earned dollars that have come from someone's pocket).

The approach to child support reflected in the *Weaver* rule is reasonable and substantially related to Georgia's objective of providing support for all children from their biological fathers. The rule in no way singles out illegitimate children and subjects them to a legal burden that legitimate children do not have to bear.

CONCLUSION

Because the order of the Georgia Supreme Court below is not final within the meaning of 28 U.S.C. § 1257, the petition for certiorari should be denied. In addition,

the denial of Petitioner's motion to compel rests on an independent and adequate state ground ("the abuse of discretion standard") and this provides a second ground for denying the petition. Next, the Georgia rule under constitutional attack does not create a classification based on illegitimacy and, for that reason, the petition should be denied outright. Finally, the procedural and factual posture of this case is so undeveloped that it does not provide a vehicle through which this Court can enunciate a meaningful principle of constitutional law without violating its own self-imposed rule against issuing advisory opinions.

Respectfully submitted,

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